Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1201

JEAN WRIGHT,

Petitioner,

vs.

WILLIAM C. WRIGHT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The petitioner, Jean Wright, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Wisconsin entered in this proceeding on November 6, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin has been published and is reported at 92 Wis. 2d 246, (1979) N.W.2d . A copy of this opinion appears in the Appendix. Also pertinent to the disposition of this case are earlier proceedings between the parties to this case as to the same issue and which appear in the Appendix as the opinions of the Wisconsin Intermediate Court of Appeals (unpublished); the Milwaukee County Circuit Court, the Honorable Robert M. Curley, presiding (unpublished); the United States Court of Appeals for the Seventh Circuit 543 F.2d 593 (1976); the United States Tax

Court 62 T.C. 377 (1974) and the Milwaukee County Circuit Court, the Honorable Leander J. Foley, presiding (unpublished).

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on November 6, 1979 with no motion for rehearing. This petition for certiorari is timely filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

Where Federal courts, based upon their holding that the intent of the parties supersedes the language of a divorce decree, have decided that certain payments are for the support of the wife rather than for her property rights, is it a violation of the Full Faith and Credit Clause for Wisconsin courts thereafter to disregard such decision and, based upon their holding that the language of a divorce decree supersedes the intent of the parties, decide that the payments are for the property rights of the wife rather than for her support?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, Article IV, Section 1:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

FEDERAL RULES OF CIVIL PROCEDURE:

28 U.S.C. Section 1738:

". . .Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same

full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948 c. 646, 62 Stat.947.

INTERNAL REVENUE CODE 1954:

Section 71 Alimony and Separate Maintenance Payments.

"(a) General Rule

(1) Decree of Divorce or Separate Maintenance. - If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

. . .

(c) Principal Sum Paid In Installments. -

(1) General Rule - For purposes of subsection (a), installments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where Period For Payment is More Than 10 Years - If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (not-

withstanding paragraph (1)) the installment payments shall be treated as periodic payments for purpose of subsection (a), but (in the case of any one taxable year of the wife) only to the extrent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received."

Section 215, Alimony, Etc. Payments.

"(a) General Rule-In the case of a husband described in section 71, there shall be allowed as a deduction amounts includable under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includable in the husband's gross income."

WISCONSIN STATUTES:

Section 247.26 (1967)

"Alimony, property division. Upon every judgment of divorce or legal separation for any cause excepting that of adultery committed by the wife, the court may, subject to s. 247.20, further adjudge to the wife such alimony out of the property or income of the husband, for her support and maintenance, and such allowance for the support, maintenance and education of the minor children committed to her care and custody as it deems just and reasonable. The court may also finally divide and distribute the estate, both real and personal, of the husband, and so much of the

estate of the wife as has been derived from the husband, between the parties and divest and transfer the title of any thereof accordingly, after having given due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case; but no such final division shall impair the power of the court in respect to revision of allowances for minor children under s. 247.25. A certified copy of such judgment which affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated."

Section 247.32 (1967)

"Revision of judgment. After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid the court may, from time to time, on the petition of either of the parties and upon notice to the family court commissioner, revise and alter such judgment respecting the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the said matters which such court might have made in the original action. But when a final division of the property shall have been made under s. 247.26 no other provisions shall be thereafter made for the wife.

Section 247.01 (1975)

"Jurisdiction. The county courts and circuit

courts have jurisdiction of all actions affecting marriage and of all actions under s. 52.10 (or concurrent jurisdiction where other courts are vested with like jurisdiction), and have authority to do all acts and things necessary and proper in such actions and to carry out their orders and judgments into execution as hereinafter prescribed. All such actions shall be commenced and conducted and the orders and judgments therein enforced according to these statutes in respect to actions in courts of record, as far as applicable, except as provided in this chapter and in s. 52.10. Whenever any court is presiding in any such action affecting marriage it shall be known as the "Family Court Branch."

STATEMENT OF CASE

The petitioner (hereinafter "wife") and respondent (hereinafter "husband") first appeared in the Milwaukee County Circuit Court on October 4, 1967 as parties to a stipulated default divorce proceeding. They had been married twenty years, had two children and a net estate subject to division of property of $837,370. (The wife had a separate $227,752 of inherited property not subject to division under Wisconsin law.) The husband held formal legal title to all of these assets. It was stipulated that the wife would be awarded the principal sum of $228,000.00, payable over a ten and one-half year period commencing immediately. The terms of the stipulation were approved by Circuit Judge Leander J. Foley, Jr. (App. pp 103-105)

Subsequently, and before the signing and entry of the findings of fact, conclusions of law and judgment, a dispute arose over the intended income tax consequences of

the stipulated award. The parties returned to Judge Foley's court, the wife arguing that the award was intended as property division and thus was not taxable to her, and the husband countering that the award was intended as alimony and thus was taxable to the wife and deductible by the husband. The parties asked Judge Foley to decide the matter, and each submitted proposed findings and conclusions.(App. p. 105-06,fn.1)

Judge Foley on January 29, 1968 adopted the wife's proposed findings of fact and conclusions of law relative to the $228,000 in payments. The relevant conclusions provided that:

> "Twenty-second. That alimony be and hereby is denied.
>
> ". . .
>
> "Twenty-fourth. That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff be and he hereby shall pay to defendant the sum of $228,000.00 within ten and one-half (10½) years of the date of this judgment; and payable on the following terms: No less than $2,000.00 per month be paid by plaintiff to the defendant for the first six months; that thereafter the plaintiff shall pay to the defendant no less than the sum of $1,800.00 per month for the balance of the term of payment of $228,000.00 specified herein."(App. pp 106-07, 616, 617)

The taxable year 1968 was the first year in which the parties did not file a joint income tax return, and the parties treated the payments made under the divorce judgment in an inconsistent manner. The wife did not report the payments as income, while the husband deducted the same. Thereupon, the Internal Revenue Service issued deficiency notices against both parties which eventually resulted in the case coming before the United States Tax Court.(App. pp. 510-511)

In deciding that these payments were income to the wife the Tax Court set forth the different natures and income tax consequences of alimony and property division as follows:

Alimony

> "Section 71(a) [of the Internal Revenue Code of 1954] provides that if a wife is divorced or legally separated from her husband she must include in her taxable income periodic payments received by her in discharge of a legal obligation arising out of the marital relationship and 'imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.' Pursuant to the provisions of section 215(a) a husband is entitled to deduct from his taxable income such periodic payments made to his divorced wife in the year paid." 62 T.C. at p. 387 (App. p. 511)

and

> "As we pointed out in *Wilma Thompson*, [50 T.C. 522 (1968)], at page 525, the text of section 71 does not use the word 'alimony' and the regulations amplify the statute by explaining that section 71(a) applies only to payments made because of the marital relationship and in recognition of the general obligation to support. Sec. 1.71-1(b) (4), Income Tax Regs. Nevertheless, many cases refer to these obligations arising because of the marital relationship as 'alimony.' " 62 T.C. at p. 389 (App. p. 513)

Property Division

> "We have recognized on a number of occasions that where there is a division of property of the parties to a divorce nd the husband makes payments in satisfaction of property rights of the wife the amounts received by the wife are capital in nature

and are neither includable in her gross income under section 71 nor deductible by the husband under section 215. *Lewis B. Jackson, Jr.*, 54 T.C. 125, 129 (1970). See sec. 1.71(c) (4), Income Tax Regs." 62 T.C. at pp. 388-389 (App. pp. 512-13)

The Tax Court then summarized the parties' arguments as follows:

"Jean argues that the sum of $228,000 to be paid to her was payment for her inchoate interest in William's property at the time of the divorce under Wis. Stats. Ann. section 247.26 (1957). . .

"William argues the aforementioned payments were necessarily payment for his legal obligation of support arising from the marital relationship as Jean did not exchange any interests in property for such payments. . ." 62 T.C. at p. 389 (App. p. 513)

The Tax Court noted that the Internal Revenue Service agreed with the argument of the wife. 62 T.C. at p. 388 (App. p. 512)

The husband's incredibly chauvinistic argument was that the wife is not entitled to division of property in a divorce in a non-community property state, unless she held formal legal title to some or all of the assets accumulated during the marriage. More incredibly, the Tax Court adopted this argument on the basis of an irrelevant capital gains tax case, *United States v. Davis*, 370 U.S. 65 (1962). The Tax Court stated:

"In reaching this conclusion [that the payments were property division and not alimony], we have found persuasive that Jean, at the time of the divorce, did not own any property in exchange for which she was to receive the sum of $228,000. Jean received all the property she owned at the time of the divorce and additionally the sum of $228,000, with a present value of $170,000. Therefore, those

payments were not received by Jean in satisfaction of her property rights." 62 T.C. at p. 390 (App. p. 514)

and

"However, Jean's inchoate rights in her husband's property under a common law jurisdiction such as Wisconsin have not been recognized as reaching the dignity of such an interest as to support a division of property among co-owners. As the Supreme Court stated in *United States v. Davis*, 370 U.S. 65, 70, 71 (1962), in dealing with the taxability to the husband of the value over the basis of property transferred by a husband to a wife in a divorce settlement, 'the inchoate rights granted a wife in her husband's property *** do not even remotely reach the dignity of co-ownershp' . . ." 62 T.C. at p. 391 (App. p. 515)

and

"This record is clear that Jean did not surrender any property interests or give up anything that is recognized as supporting a division of property in exchange for the disputed payments other than her right to alimony." 62 T.C. at p. 391 (App. p. 515)

As a general proposition the Tax Court did note that the determination of alimony or property division "rests upon the surrounding facts and circumstances" and that "the intent of the parties is a necessary factor in determining the nature of the payment." 62 T.C. at p. 389 (App. p. 513) The Tax Court concluded that the payments "were intended by the parties" to be alimony, since legally the payments could not have been property division. (62 T.C. at p. 390) The Tax Court also stated that the "labels assigned to payments . . . by the divorce decree are not conclusive." 62 T.C. at p. 389 (App. p. 513) Thus, the Tax Court held that it was not bound by the divorce

decree providing that the payments were "as and for as complete division of estate and to complete the division of property" and "alimony be and hereby is denied."

The wife appealed to the United States Court of Appeals for the Seventh Circuit. In his brief to the Seventh Circuit, the husband argued, "In her pleadings in the divorce action, Jean asked for alimony or support and that is exactly what she received."

The Seventh Circuit noted that the Tax Court had held that the payments were "pursuant to William's obligation of support rather than in satisfaction of Jean's property rights." 543 F.2d at p. 598 (App. p. 408) It further noted that no one factor was "irrebuttable proof of the parties' intentions" and that "the question of whether payments are made in recognition of the general obligation to support or in settlement of a wife's property rights depends upon the facts and circumstances of each case." 543 F.2d at p. 598 (App. p. 408)

The Seventh Circuit rejected the Tax Court's archaic holding that a wife must hold formal legal title to property in order to be entitled to property division in a divorce. 543 F.2d at p. 598 (App. p 409) The appellate court, however, still ruled:

> "While we consider this a close and difficult case, we have concluded that the Tax Court's determination should be upheld." 543 F.2d at p. 598 (App. p. 408)

The Seventh Circuit affirmed by reviewing all of the evidence in the divorce court proceeding and then holding:

> "The intention of the parties is the principal determinant. *** We find . . . that the payments were intended for the purpose of support rather than as a division of property." 543 F.2d at p. 598 (App. p. 409)

The result of the decisions of the federal courts was the assessment against the wife of a $102,840.00 income tax liability which diminished her $228,000 to $125,160. (App. p. 108)

Although believing that the federal courts had erred on the factual issue of whether the payments were intended for her support rather than as property division, the wife was left with little choice but to return to the state courts. She had had her day in federal court and put forth her best arguments. It still was determined that the divorce decree had granted her alimony in furtherance of the marital obligation of support and not property division.

In 1977, with the adverse federal decisions in hand, the wife went back to the Milwaukee County Circuit Court for relief. (App. pp. 701-02) Although ten years had passed, the divorce court still had jurisdiction under sec. 247.32 Wis. Stats. (1967), to modify alimony upon the basis of changed circumstances and also had jurisdiction upon the basis of changed circumstances and also had jurisdiction under sec. 247.01 to enforce the judgment. The divorce court, however, did not have jurisdiction to modify property division under secs. 247.26 and 247.32.

The wife moved the divorce court to do one of two things, since the federal courts had determined the payments to be alimony:

> a.) Modify those alimony payments by increasing them so the wife had the money to pay the taxes, upon the basis of changed circumstances under sec. 247.32, namely the income taxes unanticipated by both the wife and the divorce court; or
>
> b.) Enforce the judgment by ordering the husband to pay the wife a net $228,000, to-wit, reimburse her the $102,840 he had cost her by his deduction of the payments and convincing of the federal courts that the parties had intended those payments to be

alimony when in fact the parties and the divorce court had intended the payments to be property division.

With the adeptness and lack of embarrassment of a carnival vendor, the husband opposed her motion upon the basis that the disputed payments in the divorce decree were for property division and not alimony, such that the divorce court lacked jurisdiction to modify them under sec. 247.32, Wis. Stats. The husband argued that the divorce court was not bound by the federal courts' determinations that the payments were alimony, since a state court is not bound by the "label" a federal court has placed upon an award. The husband had made this same type of "label" argument to the federal courts in convincing them to disregard Judge Foley's conclusions and judgment that "alimony be and hereby is denied" and "that as and for a complete division of estate and to complete the division of property of the parties."

In his decision on the wife's motion, Judge Robert M. Curley of the Milwaukee County Circuit Court held that Wis. Stats. §247.01 empowered the court to "make any order necessary" in the enforcement of the original decree. Judge Curley held that the payments had been intended to be for property division and to be non-taxable to the wife and ordered the husband to pay to the wife the additional sum of $102,840.00. Judge Curley also held that he could have entered the same order under sec. 247.32, Wis. Stats. 1967, by ordering increased alimony payments. (App. pp. 300-310)

The husband appealed to the Wisconsin Court of Appeals. That court reversed Judge Curley's decision and ruled that neither sec. 247.01 nor sec. 247.32 gave the divorce court jurisdiction to modify the original judgment. The Wisconsin Court of Appeals held that the language of the judgment unambiguously provided for property division and not alimony. The Court stated:

" 'The provision for alimony may be revised from time to time but the division of the estate is fixed for all time. Sec. 247.32, Wis. Stats.'

"The judgment provision for payment of $228,000 in monthly installments specified that it was 'as and for a complete division of estate and to complete the division of property between the parties.' The order appealed from invalidly modified the provision. *** Payments to complete the division of property were not [subject to modification under sec. 247.32, Wis. Stats.]" (App. p. 211-212)

Unlike the Seventh Circuit which had held that "the intention of the parties is the principal determinant" and then determined that "the payments were intended for the purpose of support rather than as a division of property", *supra*, the Wisconsin Court of Appeals held that the parties' intent was irrelevant. It held that:

" 'Judgments are to be construed like other written instruments' *** '[T]he office of judicial construction is not to make contracts or to reform them, but to determine what the parties contracted to do; not necessarily what they intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use.' " (App. p. 209)

In other words what labels the parties chose to use.

The wife then petitioned the Wisconsin Supreme Court for review of the lower appellate court's decision. The state Supreme Court affirmed the decision of the Wisconsin Court of Appeals. In its decision the Wisconsin Supreme Court reiterated the intermediate court's conclusion that the judgment was unambiguous as to providing for property division and not alimony and therefore the intent of the parties was irrelevant. The Wisconsin Supreme Court stated that:

> "If there is no ambiguity on the face of the stipulation or judgment, the subjective intent of the parties is irrelevant." 92 Wis. 2d at p. 257 (App. p. 112)

In rejecting the wife's claim that the federal court decisions barred a relitigation of the question of whether the award was for alimony or property division, the state's highest court held that the "definition of alimony and property division under state law is not the same or co-extensive with the provisions for periodic or installment payments under the Internal Revenue Code." 92 Wis. 2d at p. 257 (App. p. 112) The Court further stated that, "although the definitions and applications may overlap in many cases, they clearly are not co-extensive for all purposes and in all events." 92 Wis. 2d at p. 261 (App. p. 116)

The Wisconsin Supreme Court thus held that it was not bound by the federal courts' determination that the parties intended support, such that the labels weren't binding; and, instead, the Wisconsin Supreme Court determined that the labels were binding, such that the parties' intent was irrelevant. The Wisconsin Supreme Court concluded:

> "The judgment called it a division of estate and division of property. Under Wisconsin law this was a property division and as such it is not subject to modification under our statutes. The Circuit Court lacked authority under sec. 247.32, Stats. to modify the original judgment." 92 Wis. 2d at p. 263 (App. p. 118)

RAISING THE FEDERAL QUESTION

This Court has stated that a federal question is presented when it is contended that the ruling under review has disregarded a prior judicial determination of the issues between the parties. *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938), *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Long Island Loan & Trust Company*, 172 U.S. 493, 507-510 (1898). In such a situation the federal question necessarily raised is whether full faith and credit, in accordance with Article IV, Sec. 1 of the Constitution, has been accorded to the judicial proceedings of another court in the same, or a differing court system. In this regard, and relative to the extension of the full faith and credit requirement as between the state and federal courts, in *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U.S. 30 (1924) the Court stated at p.33:

> "While judicial proceedings of the federal courts are not within the terms of the constitutional provision, such proceedings, nevertheless, must be accorded the same full faith and credit by state courts as would be required in respect of judicial proceedings of another State. *Hancock National Bank v. Farnum*, 176 U.S. 640, 644, *Embry v. Palmer*, 107 U.S. 3, 9."

Further, it should be recognized that the dictates of Article IV, Sec. 1 and its application to judicial proceedings between the state and federal court systems have been codified in 28 U.S.C. Sec. 1738 of the Judicial Code.

The petitioner's decision to return to the state court system following the adverse federal court decisions and therein seek additional monies in order to pay for her "unanticipated" tax liability, was irrefutably premised upon the binding and conclusive effect of the federal proceedings. The federal courts in reaching their decisions regarding the parties' respective tax liabilities, had looked behind the labels placed on the original decree and determined that the intent of the award was to provide for the petitioner's support and was not a division of the marital estate in recognition of her property rights.

The analysis undertaken by the federal courts as to the intent of the award is the same as would be performed by any state court upon a motion for additional alimony based upon the changed circumstances of the parties. Pursuant to Wis. Stats. Sec. 247.32 an alimony award is subject to modification at any time if the circumstances of the parties change; however, a division of property is final for all times and cannot be reopened except upon evidence fraud. *Johnson v. Johnson*, 37 Wis. 2d. 302, 155 N.W. 2d 111 (1967). Therefore, the petitioner believing that the parties had litigated the issue of whether the divorce agreement was to be interpreted as an alimony award or a property settlement and that the decision of the federal court was binding, she petitioned the state court for additional alimony invoking the powers granted in Sec. 247.32.

It is unmistakable from the record that the petitioner from the onset of the state proceedings, was arguing that the federal court had already determined the issue of whether the award was to provide for alimony rather than a property division, and that its decision on that issue was binding. Accompanying the petitioner's motion for modification of the award pursuant to Sec. 247.32, was her affidavit wherein Paragraphs 8 through 17 gave substantive attention to the issues, arguments and decisions made in the federal courts. (App. pp. 705-16) Additionally, the petitioner reiterated her argument that the federal decrees were binding upon the state court in the briefs that were submitted to the Milwaukee County Circuit Court prior to its decision on the petitioner's motion. However, most conclusive in demonstrating that the federal question was placed squarely in controversy between the parties is the argument in the respondent's brief, submitted to the trial court that:

> "Characterizing payments as alimony or for support under Federal income tax law does not have the effect of determining the nature of such payments under state law, no more than state law controls the character of such payments for Federal income tax purposes." (App. p. 803)

Although the Milwaukee County Circuit Court ultimately granted the petitioner her requested relief, albeit on alternative grounds, Judge Robert J. Curley explicitly addressed and rejected the petitioner's argument that the state court was bound by the federal decisions and stated:

> "Great emphasis is placed upon the actions taken in the Federal Tax Court. This court can only say in this regard that it is not bound by any decisions made by the Federal Tax Court any more than that court would be bound by decisions made by this court, and that this court will consider those actions insofar as they have operated to reduce the defendant-wife's settlement of $228,000.00 by a sizeable sum, to wit, $102,840.00." (App. p. 307)

In the subsequent appeals taken before the Wisconsin Court of Appeals and the state supreme court, the parties continued to argue their conflicting positions as to whether the state court for purposes of invoking its ongoing jurisdiction, pursuant to Sec. 247.32, to modify the divorce decree, was bound by the decisions of the Federal court. This fact is amply demonstrated in the petitioner's Petition to Appeal submitted to the Supreme Court of Wisconsin and the Respondent's Brief in Opposition to Petition to Appeal. (App. pp. 901-907) Furthermore, it should be pointed out that in the petitioner's brief to the state's highest court she left no doubt that it was her position that the federal court's ruling was a bar to any further litigation on the issue of whether the

award was intended as support or property division, therein it was stated on her behalf:

> "This is a case where the wife feels keenly the injury that can result in one set of facts being tried in two different court systems. One form of injustice that can occur is that a party can take contradictory positions in the two systems and still prevail in both systems by each system refusing to recognize the action of the other. Here, the husband argued in the federal system that the payments were not for property division but were for support. When the case then returned to the state system, the husband argued and still argues that the payments were really for property division and not for support and thus are not modifiable regardless of how and why the federal system treated them as support payments. The respondent earnestly submits that this court strike down this Catch-22 argument and affirm the lower court's decision which only required the husband to abide by his earlier agreement to allow the divorce court to determine the nature of the payments." (App. pp. 1001-1005)

Lastly, it should be noted that the state supreme court in its opinion expressly rejected the federal question which was raised by the petitioner at every stage of the proceeding in controversy. In dismissing the petitioner's argument that the federal decision relative to the intent of the award was binding on the state courts for purposes of a Sec. 247.32 type motion, Justice Roland Day of the Wisconsin Supreme Court rationalized:

> 'Counsel for Jean Wright argues that if the installment payments are taxable under the federal law then they are also alimony under Wisconsin law. This argument would equate periodic payments under the Internal Revenue Code Sec. 71 with

> alimony under state law. Although the definitions and applications may overlap in many cases, they clearly are not co-extensive for all purposes and in all events. The Internal Revenue Code addresses itself to periodic and installment payments. It is not the labels placed on the payments which are determinative under the federal tax law. It is the structure and effect of the payments which control the characterization. (Footnote omitted) 92 Wis.2d at 261-62. (App. pp. 116-17)

The petitioner has gone into great detail in exposing the development of her federal question in the state court proceedings below. This is deemed necessary in light of the fact that heretofore the petitioner had not expressly labeled her argument in terms of the full faith and credit doctrine or the concommitant concept of collateral estoppel. However, this fact should in no manner prejudice the petitioner's case as the rule of *New York ex rel Bryant v. Zimmerman* 278 U.S. 63, 67 (1929) propounds, that a federal question has been "brought to the state court's attention with fair precision . . . if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." Additionally, where the federal question is disposed of by the decision of the State's highest court, any issue as to the proper raising of the federal question before the state court should disappear. *Jenkins v. Georgia* 418 U.S. 153, 157, (1974) *Ocala Star-Banner Co. v. Damron* 401 U.S. 295, 299, (1971) *Coleman v. Alabama*, 377 U.S. 129, 133 (1964). Yet, as is particularly applicable to this case it is not essential that the state court's denial of the federal claim "shall have been put in direct terms" as it is sufficient if "the necessary effect of the judgment has been to deny the claim." *New York ex rel Bryant v. Zimmerman, supra* at 67.

REASONS FOR GRANTING THE WRIT

". . . Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

" 'That's some catch, that Catch-22,' he observed.

" 'It's the best there is,' Doc Daneeka agreed.

"Yossarian saw it clearly in all its spinning reasonableness. There was an elliptical precision about its perfect pairs of parts that was graceful and shocking, like good modern art, and at times Yossarian wasn't quite sure that he saw it at all, just the way he was never quite sure about good modern art or about the flies Orr saw in Appleby's eyes." Heller, *Catch-22* (Simon and Schuster, 1955), page 46

ARGUMENT

Long ago, the Supreme Court held that the whole subject of the domestic relations between a husband and wife belongs to the laws of the states. *Ohio ex rel Popovici v. Agler*, 280 U.S. 379, 383, (1930). This decision predated the intervention of the Internal Revenue Code into the realm of domestic relations through §71 and §215 (Internal Revenue Code 1954). Since the adoption of §§71 and 215, *Comm'r v. Lester*, 366 U.S. 299 (1961) stands alone as possible guidance on the question of the interrelationship of the federal tax laws with the states' power over issues of domestic relations. However, a close examination of the *Lester* decision sheds little light on whether there is, in fact, an interrelationship between the federal taxing power and the divorce laws of the states. Moreover, if it can be inferred from *Lester* that a relationship exists between the federal and state powers, the decision fails to expose the nature and extent of this relationship.

For these reasons the case before you presents the Court with an opportunity to determine this crucial relationship. Furthermore, this case calls out for the overriding concern for maintaining an efficient and just system of judicial federalism, wherein the courts of the several states and the national government are required to recognize and respect the judgments of one another. To this end a review of this case is necessary to determine whether the full faith and credit clause has viability in the context of tax-divorce litigation, thereby insuring litigants certainty and consistency when the same issue is litigated in two different court systems, and thus, preventing others from being placed in the same inherently unfair predicament as the petitioner.

In *Commissioner v. Lester, supra*, the Court was asked to decide under the 1939 Code, §22,[1] whether sums paid incident to a divorce decree and not specifically attributed to child support were properly deductible. Although the case was ultimately decided under §22(k), a provision in the taxing statute not applicable herein, the decision undertook a general discussion on the intent of the entire statute. The Court, citing *Helvering v. Fitch*, 296 U.S. 1 (1935), premised its discussion on the pre-1942 tax law that amounts paid pursuant to a divorce decree were not deductible unless the "decree, settlement agreement and state law operated as a complete discharge of the liability

1. Sec. 22 of the 1939 Internal Revenue Code was renumbered §71 in the 1954 Code.

of support." 366 U.S. at 301. The Court explained the changes in the tax laws created by the promulgation of §22 by looking at the congressional hearings on the measure. Therein, it was noted that §22 was designed "to eliminate the uncertain and inconsistent tax consequences resulting from the many variations in state law" and thereby the statute would produce uniformity in treatment regardless of local law. *Supra*, at 301. The Court concluded that since §22(k) required that amounts for child support be specifically designated, irrespective of state law regarding child support, the general amounts paid to Lester's former wife were deductible.

While *Lester* discussed a general intent to abandon the use of state law in determining the tax conequences of payments made incident to a decree of divorce, a caveat must be added. It must be recognized that the forerunner to §71 was primarily designed to resolve the inconsistencies arising when the particular state law contained no provision for the granting of alimony or failed to create a duty of support following the dissolution of a marriage. The Court in *Lester*, in quoting the congressional intent underlying the statute, omitted reference to the fact that the provision was designed to produce uniformity in tax treatment regardless of the variance in state laws "concerning the existence and continuance of an obligation to pay alimony." H.Rep. No. 2333, 77th Cong. 2nd Sess. p. 72. Generally See: 5 Mertens, *Law of Federal Income Taxation* §31A.02 p. 16 (1975), citing: *Tuckie G. Hesse*, 7 T.C. 700 (1946), applying Pennsylvania law which had no statutory provisions concerning alimony; and, *Thomas E. Hogg*, 13 T.C. 361 (1949), where Texas law failed to impose the duty of support on a divorced husband.

Thus, to the limited extent of the periodic element as discussed hereafter and the limited extent that the laws of some states fail to provide for alimony or the ongoing duty of support, the petitioner agrees with the Wisconsin

Courts' statement that state divorce law and federal tax law in regards to alimony and property division are not the same or co-extensive for all purposes and the labels placed on the award by either court system should not control. However, Wisconsin is a state whose laws provide for the awarding of alimony based upon a husband's ongoing duty of support. *Miner v. Miner*, 10 Wis.2d 438, 103 N.W. 2d 4 (1960)[2], and additional authority cited *infra*. Therefore, the petitioner respectfully submits that what the state's highest court failed to perceive is that for purposes of the taxing statute, the analysis undertaken by the federal courts in determining whether the payments were intended as support rather than a division of property, is the same analysis and considers the same factors as a state court would under state law in determining whether the divorce decree intended to award alimony as opposed to payment for property rights.

There is, of course, one other difference between federal and state alimony which is irrelevant to the full faith and credit nature of this case. Sec. 71 requires that the payment be "periodic" in addition to being in discharge of the obligation to support. A payment can be periodic either by being subject to a contingency or by being payable over a period of time extending more than ten years from the date of the decree. In this case the payments were periodic, since they extended more than ten years from the date of the decree.[3] Thus, the only thing for both the federal courts and the state courts to determine herein was the common and straight-forward ele-

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2. Where at p. 466 it is stated that alimony "arises out of the husband's duty to support his wife."

3. Under Wisconsin law the Wrights' divorce decree did not become final for a year. The payments extended 10½ years from the interlocutory decree but only 9½ years from the final decree. The federal courts determined herein that the sec. 71 ten-year period commenced running from the date of the interlocutory decree.

ment under both the federal and state systems, i.e., were the payments for the support of the wife or in settlement of her property rights.

The issue before the Seventh Circuit Court of Appeals was whether under §71 the payments were includable in the petitioner's gross income. The Seventh Circuit explained in the following terms that this determination is subject to a two-part test:

> "Thus, to be includable under Section 71 in the gross income of the wife, the principal sum must be payable in installments over a period in excess of ten years (Section 71(c)(2)) and must be in discharge of an obligation imposed under the decree because of the marital relationship (Section 71(a)). This latter requirement 'contemplates a payment made in pursuance of the husband's obligation of support and not in satisfaction of some property rights of the former spouse.' " *Van Orman v. Commissioner*, 418 F.2d 170 (7th Cir. 1969). 543 F.2d at p. 597 (App. p. 407)

See also: Reg. 1.71-1(b)(4) and *Marion R. Hesse*, 60 T.C. 685 (1973)[4]

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4. At p. 691 it is stated:

> "The legislative purpose behind sec. 71 and 215 is uniform treatment of amounts paid in nature of alimony or in lieu of alimony, regardless of variances in the laws of the different states. [citations omitted] The regulations promulgated under sec. 71 provide such section applies only to payments made because of the family or marital relationship in recognition of the general obligation of support. Sec. 1.71-1(b)(4), Income Tax Regs. Payments made in recognition of such obligation are includable in the gross income of the wife under sec. 71 regardless of the absence of alimony in the State law. [citations omitted] On the other hand, payments made in the nature of a division of property are capitol in nature, and therefore not subject to the provisions of Sec. 71 even though periodic and incident to a divorce. [citations omitted]"

In review of the Tax Court's conclusion that the payments were not made in recognition of the petitioner's property rights, the federal appellate court remarked that "the Tax Court correctly observed that the question of whether payments made in recognition of the general obligation to support or in settlement of a wife's property rights depends upon the facts and circumstances of each case." 543 F.2d at p. 598 (App. p. 408) The court noted its conclusion that the decision of the Tax Court should be upheld and stated in support thereof:

> "Among the factors which we believe supportive of this conclusion is the fact that the $228,000.00 awarded to Jean was obviously not paid in exchange for tangible property owned by her at the time of divorce." *Supra* at 598 (App. p. 408)

and in rejecting the petitioner's arguments the Seventh Circuit rationalized:

> "As Jean contends, the fact that the payments were for a fixed sum, were secured and were not contingent upon death or remarriage is indicative of a division of property rather than payment of support. So also is the divorce court's adoption, and inclusion in the divorce decree, of the findings and conclusions submitted by Jean's attorney. We find, however, that these conclusions are more than counterbalanced by those factors indicating that the payments were intended for the purpose of support rather than as a division of property." *Supra* at 589 (App. p. 409)

Lastly, the federal court of appeals rejected the petitioner's reliance on *Van Orman v. Comm'r, supra,* distinguishing that "[n]o such separate provision for the payment of support was included in the Wright divorce decree." 543 F.2d at p. 599 (App. p. 410)

Under Wisconsin law decided prior to the case under

review, the following principles were enunciated in distinguishing an alimony award from a division of property:

> "Whereas alimony is a provision for the maintenance of the wife, . . ., the division of the estate is an adjustment of property rights and equities between the parties." *Johnson v Johnson, supra,* at p. 310, (citation omitted.)
>
> ***
>
> "Sec. 247.26, Stats., provides that alimony where granted shall be a payment 'to the wife . . . out of the property or income of the husband, for her support and maintenance. . . .'" *Sholund v. Sholund,* 34 Wis. 2d 122, 130, 148 N.W.2d 726 (1967)
>
> "Alimony is a maintenance awarded by the court . . . it is not a portion of his estate to be assigned to her . . . but a provision for her support." *Luedke v. Luedke,* 215 Wis. 303, 305, 254 N.W. 525 (1934)
>
> "Alimony is a substitute for marital support, providing for the maintenance of the wife." *Farwell v. Farwell,* 33 Wis. 2d 324, 147 N.W.2d 289 (1967)
>
> ". . . the purpose of alimony is postdivorce support." *Lemm v. Lemm,* 72 Wis. 2d 457, 259 N.W.2d (1976)

Thus, regardless of whether the case is in federal court pursuant to §71 or in state court under §§247.32 and 247.26, the issue of whether the divorce award was for the support of the wife, rather than a property division, is common to each proceeding. The concept of "support" is not unique or controlled by differing principles depending on whether one is in the state or federal courts. Nowhere in §71 of the Code or the accompanying regulations does one find a distinct federal definition of the legal concept of "support." Support is a common sense

determination based upon the facts and circumstances of the case. This is the analysis undertaken by the Tax Court and affirmed by the Seventh Circuit and the same analysis that a Wisconsin state court would undertake if the question had initially been before it.

The contitutional provision requiring the extension of full faith and credit in the courts of the United States is rooted in the common law concepts of *res judicata* and collateral estoppel; these doctrines being fully applicable to tax matters, *Comm'r v. Estate of Bosch,* 387 U.S. 456, 462-3 (1967), *Freuler v. Helvering,* 291 U.S. 35, 43 (1934). Although the concepts are similar in principle and purpose, they differ in the scope of their application. Whereas *res judicata* precludes the relitigation of an identical cause of action; collateral estoppel operates as a bar on issues previously determined between the parties when the same issues appear in a subsequent and different cause of action. In *Comm'r v. Sunnen,* 333 U.S. 591 (1948) this Court declared at pp. 601-02:

> "Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judggment."

As has been amply illustrated herein, the same facts, documents and "bundle of legal principles" were before the federal and state courts. The decisions of the Wisconsin Supreme Court and the state's Court of Appeals holding that the divorce award was unambiguously a property division, such that the intent of the parties and trial court were irrevelant and didn't have to be reviewed, are an unabashed collateral attack on the federal decisions. In determining that the intent of the parties was to provide support, the federal courts necessarily arrived at the con-

clusion that the wording of the judgment was not dispositive thus requiring an analysis of the facts, circumstances and intent underlying the decree.

In *Comm'r v. Estate of Bosch, supra* this Court was asked to decide what was the impact of a state trial court's decision on a question determinative of federal tax liability. Justices Harlan and Fortas, dissenting, called such an issue "doubly important", a "difficult and intensely practical problem", involving "basic questions of the proper relationship in this context between state and federal judicial systems" *Supra* at 471. The petitioner's case is the mirror-image of *Bosch* in that it involves what effect a federal decree in a divorce-tax matter will have on a subsequent state action pursuant to the states' powers over domestic relations. Perhaps the petitioner's case is more shocking in that it involves a state court's refusal to abide by the decision of a federal appellate court. The importance of *Bosch* and therefore, the petitioner's case, is captured in the purpose behind full faith and credit and the concommitant doctrines of *res judicata* and collateral estoppel. The doctrines are designed to prevent repetitious suits, thus fostering judicial economy and the certainty of legal relations. *Comm'r v. Sunnen, supra* at 597.

Full faith and credit, *res judicata* and collateral estoppel are legal doctrines formulated to prevent the inequities that can spring from judges of differing jurisdictions hearing the same case, or the same set of facts, as between the same parties. These doctrinal concepts must be enforced in order to prevent the operation of jealous pride wherein a judge, or a court of one system disregards the decision of another court. Otherwise, the concept of judicial federalism will be trampled under. This was a concern expressed in *Stoll v. Gottlieb*, 305 U.S. 165 (1931) wherein a collateral attack on a federal court judg-

ment was subsequently commenced in state court. The *Stoll* court acknowledged that the federal court may have erred as to its jurisdiction to hear the case but affirmed the federal court's substantive holding and stated:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." *Supra* at 172.

Yet, the respondent herein successfully disclaimed the arguments he had made in federal court and argued the exact opposite proposition in the state court proceedings and obtained victory in both systems on diametrically opposed findings and conclusions. The fact that a litigant such as the petitioner can be trapped between two different judicial systems and ambushed by her opponent's inconsistent arguments is contrary to public policy. In *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522 the Court stated at 525-26:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

CONCLUSION

The petitioner has been on a thirteen year journey from court to court. In every court except the divorce court, she has met injustice in the form of issue obfuscation, litigation by economic attrition and the success of the contradictory arguments made by her ex-husband's attorneys. Perhaps, most ludicrous is that even now as she places her case before the court of last resort, her litigation of this matter is not complete, as the Wisconsin taxing authorities now must choose whether they will adhere to the decision of its highest court or whether they will follow the federal tax decision.[5] Although she is weary from the fray she asks for the review of her case, so that others similarly situated will not have to confront the Catch-22 that she has been fighting the past thirteen years.

Respectfully submitted,

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5. Wisconsin's definition of "gross income" is geared into the federal determination. Wis. Stats. §71.02(2)

APPENDIX
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case, mandamus will not be granted where the petition has shown a completely naked legal right.

Appellants' contention that the trial court considered improper facts in making its ruling is not relevant since the issue in this case is whether the facts alleged in the petition and stipulation are sufficient to support the issuance of a writ of mandamus. We conclude they are not and affirm the order of the trial court.

By the Court.—Order affirmed.

William C. WRIGHT, Appellant, v. Jean WRIGHT, Respondent.

Supreme Court

No. 77-686. Argued September 11, 1979.—Decided November 6, 1979.

1. Judgments §403*—construction—time and manner.
Judgment is to be construed as of time of its entry and in same manner as other written instruments.

2. Judgments §394*—construction—ambiguity—matters considered.
Judgment that is clear on its face is not open to construction but if it is ambiguous, construction is allowed and court will consider whole record, including pleadings, findings of fact and conclusion of law, and judgment itself.

3. Divorce §144*—property division award—unambiguous—not authority to amend—payment of federal income taxes.
Where judgment required that former husband pay to wife $228,000 over 10½ years and plaintiff complied, court had no authority to amend 10-year-old divorce judgment to provide for payment by former husband of $102,840 representing amount of federal income taxes due from wife on amount paid to her.

* See Callaghan's Wisconsin Digest, same topic and section number.

4. Divorce §125*—property stipulation—tax consequences to client—duty of counsel to consider.
Counsel when entering into divorce stipulation has duty to consider tax consequences to client.

5. Divorce §123*—property stipulation—tax consequences—obligation of court to consider—failure may be abuse of discretion.
Trial court is obliged to consider income tax consequences in property stipulation, and failure to do so may constitute abuse of discretion.

6. Judgments §394*—absence of ambiguity—subjective intent of parties irrelevant.
If there is no ambiguity on face of stipulation or judgment, subjective intent of parties is irrelevant.

7. Divorce §144*—property division award—not subject to modification—income tax thereon.
Although court had jurisdiction to modify alimony awarded for insurance, medical and investment expenses, court could not award $102,840 representing amount of federal income taxes due from former wife on money paid to her by former husband pursuant to property award provision of divorce judgment, since such award was property division and thus not subject to modification.
CALLOW, J., dissents.

REVIEW of a decision of the court of appeals. *Affirmed.*

For the appellants there were briefs by *Robert E. Cook* and *Cook & Franke, S.C.*, attorneys, and *Godfrey & Kahn, S.C.*, of counsel, and oral argument by *Robert E. Cook* and *Gerald J. Kahn*, all of Milwaukee.

For the respondent there were briefs by *Bruce C. O'Neill* and *Fox, Carpenter, O'Neill & Shannon, S.C.*, of Milwaukee, and oral argument by *Bruce C. O'Neill.*

DAY, J. This case comes to the Court by petition to review a decision of the Court of Appeals reversing

* See Callaghan's Wisconsin Digest, same topic and section number.

that portion of a divorce judgment amended by the Circuit Court. The Court of Appeals held that the Circuit Court had no authority to amend a ten year old divorce judgment to provide for payment by the former husband to the former wife of $102,840 representing the amount of federal income taxes due from her on $228,000 paid to her by him in monthly installments over a ten and one-half year period in accordance with the terms of the divorce judgment. The Court of Appeals rejected the wife's argument that such additional payment was either alimony under sec. 247.32, Stats. 1967 or an enforcement of the original judgment under sec. 247.01, Stats. 1977 on the theory the $228,000 was to be undiminished by income taxes.

William C. Wright and Jean Wright were married in 1948. In 1967 he commenced a divorce action and she filed a counterclaim. On October 4, 1967, the matter came on for a hearing before Honorable L. J. Foley, Jr., Circuit Judge. The parties stipulated that his complaint be withdrawn and that she be granted a divorce on her counterclaim as a default. Testimony was taken and the divorce was granted to her. The parties also entered into an oral stipulation in open court providing for the division of real and personal property, maintenance of insurance and investments, custody of children, payment of attorney fees and other matters. The combined assets of the parties at the time of the hearing had a value of $1,065,122 of which $269,018 was the separate property of Jean Wright and was awarded to her pursuant to the stipulation.

The stipulation was made part of the record through a process of asking questions of the parties to determine whether they understood and agreed to its provisions.

Questions were first directed to Jean Wright by her counsel. Among the questions were those relating to alimony and property division as follows:

"*Question:* That alimony be denied, you understand that?

"*Answer:* (by Jean Wright) Yes. . . .

"*Question:* That the defendant (sic) will pay you $228,000.00 within the next ten and a half years or ten years six months on the following terms: no less than $2,000.00 per month for the next six months after the entry of judgment and the sum of $1,800.00 per month for the balance of the term of the payment of that $228,000.00, do you understand that?

"*Answer:* (by Jean Wright) Yes, sir."

The stipulation provided that payment of the $228,000 would be secured by an escrow account funded with stock. If Mr. Wright died, the unpaid balance of the $228,000 would either be paid from his estate or from the escrow account. The payment of $228,000 was in addition to other property awarded to her.

William Wright's attorney then questioned him and asked:

"*Question:* You feel you fully understand the provisions thereof?

"*Answer:* (by Mr. Wright) Yes. . . .

"*Question:* Full and complete division of estate in lieu of any claim of alimony upon you by Mrs. Wright?

"*Answer:* (by Mr. Wright) Yes."

No objection was made to the answers given by either party regarding their understanding of the stipulation. No statement was made in the stipulation respecting the payment of taxes.

The court on the record granted a divorce to Jean Wright and dismissed the complaint of William Wright, granted custody of the children in accordance with the stipulation and stated "In all other respects the sipulation of the parties is acceptable. The court will make it a part of the record, the findings of fact, conclusions of law and judgment, holding that matter open as it relates to guardian ad litem fee."

The parties next appeared before the court on December 8, 1967, in a dispute over the wording of the findings of fact, conclusions of law and judgment, particularly with respect to the $228,000 payment to Jean Wright. Both counsel argued as to which of the parties would be responsible for the income taxes on the monthly payments.[1]

[1] (Counsel for Jean Wright)

"*Mr. Loeb:* All right, the transcript will speak for itself then. I would strenuously object to any modifications of the transcript or the judgment or the findings or the stipulation at this time.

"*The Court:* I don't think what we are involved in, Mr. Loeb, is a modification of anything and I agree with you that the Court would not be modifying, the question is the wording of the findings of fact, conclusions of law and judgment. There are substantial financial problems involved in the wording.

"*Mr. Loeb:* Exactly.

"*The Court:* The Court must word that in accordance with the judgment that was made or the findings of fact and conclusions of law that were made at the time of the trial. I would never forbid or foreclose a person to properly prepare an argument that they intended to make in an issue that has involved substantial rights of parties. . . .

"*Mr. Loeb:* I want to make this record clear at this time so there is no doubt about this whatsoever. It is considered on behalf of the defendant that as far as this periodic payment is concerned for ten and a half years is not taxable to her as alimony, period.

(Counsel for William Wright)

"*Mrs. Shellow:* We would like the record to show as far as the plaintiff is concerned that the stipulation which was entered into and the selection of the ten and a half years period as a period of time for the payment to be made of the property division in this matter was for purposes of having this sum, the $228,000.00 specifically mentioned, deductible to the plaintiff and it was this understanding which was had between counsel which enabled the stipulation to come into being. The purpose of the selection of the period to ten and a half years was for purposes of establishing the deductibility of such payments.

"*Mr. Loeb:* My reply to that, I do want to make a reply to that because the fact is that at the time the ten and a half years was mentioned at the two tables in this Courtroom when each of our

Counsel for William Wright proposed that the paragraph relating to the $228,000 read that "alimony be and hereby is denied and in lieu of said alimony and in full satisfaction of any claim therefor, and as a complete division of estate and to complete the division of the property of the parties, the plaintiff shall pay to the defendant the sum of $228,000.00 in 10½ years of entry of judgment, said sum to be paid at the rate of $2,000.00 each month for a period of six months and $1,800.00 each month thereafter for a period of 10 years."

The trial judge rejected the husband's proposed findings of fact and conclusions of law and instead adopted those submitted by counsel for the wife which provided in part:

"Twenty-second. That alimony be and hereby is denied.

". . .

"Twenty-fourth. That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff be and he hereby shall pay to defendant the sum of $228,000.00 within ten and one-half (10½) years of the date of this judgment; and payable on the following terms: No less than $2,000.00 per month be paid by plaintiff to the defendant for the first six months; that thereafter the plaintiff shall pay to the defendant no less than the sum of $1,800.00 per month

clients was present, I made it very specifically clear that we would not consider this as alimony or report it as alimony, that it was in truth and in fact a division of estate, period.

"*The Court:* All right.

"*Mrs. Shellow:* In lieu of alimony.

"*Mr. Loeb:* Even if it were in lieu or otherwise.

"*Mrs. Shellow:* Our only contention, Mr. Loeb, is that this is a division of estate in lieu of alimony.

"*Mr. Loeb:* If you do so, we warn you now, if you take it off as alimony, you proceed at your own peril.

"*Mrs. Shellow:* You fail to pay tax on it that's between you and your client, Mr. Loeb."

for the balance of the term of payment of $228,000.00 specified herein."

Findings of fact and conclusions of law were signed by the court on January 29, 1968. The judgment was signed and filed on February 2, 1968.

Each party took the position that the other should bear the federal income tax consequences of the monthly payments to Jean Wright. William Wright deducted the payments on his income tax return and Jean Wright failed to include the payments made to her as income. She took the position that the payments were a division of property rather than support under federal income tax law. The Internal Revenue Service assessed deficiencies against both parties.

The matter was litigated in the Tax Court[2] which ruled that the payments made to her grew out of his marital obligation of support and treated the payments as income to her for federal income tax purposes. The matter was then appealed to the Seventh Circuit Court of Appeals[3] which determined that the payments were periodic payments under §71 of the Internal Revenue Code[4] and includable as income to Jean Wright in the year received and deductible by William Wright under §215 of the Internal Revenue Code.[5] The ten and one-half year payment period was a factor in the decision of the federal courts.[6]

[2] *Wright v. Commissioner*, 62 T.C. 377 (1974).

[3] *Wright v. Commissioner Of Internal Revenue*, 543 F.2d 593 (7th Cir., 1976).

[4] 26 U.S.C.A. (I.R.C. 1954) §71.

[5] 26 U.S.C.A. (I.R.C. 1954) §215.

[6] The Federal Court of Appeals noted, "Had the parties intended these to be installment payments under Section 71(c)(1) rather than periodic payments under Section 71(a), they could easily have provided that the principal sum of $228,000.00 must be paid within ten years." *Wright v. Commissioner Of Internal Revenue*, 543 F.2d 593, 598 (7th Cir. 1976).

The resulting increase in taxes to Jean Wright was computed to be $102,840.

Jean Wright returned to the state court to try and recoup payment from her former husband for the tax assessment. The family court commissioner who reviewed her petition to modify the divorce judgment held that he lacked power to do so by virtue of sec. 247.32, Stats.,[7] and dismissed her petition. This occurred during 1977, approximately ten years after the divorce was granted.

Jean Wright then sought a *de novo* review of the family court commissioner's determination. She requested the judgment be modified to provide for alimony in an amount sufficient to pay the additional taxes or that her former husband be ordered to pay on a theory that the judgment meant to give her $228,000. free of any tax obligation and that the court was merely enforcing that judgment provision.[8]

The circuit court relying primarily on its interpretation of *Rotter v. Rotter*, 80 Wis.2d 56, 257 N.W.2d 861 (1977), amended the judgment by adding paragraph thirty-four to provide:

"That, in enforcement of this judgment and not as alimony, support or maintenance, (William Wright) shall pay to (Jean Wright) forthwith the sum of $102,840.00, which sum, in the intent of this court, shall not be

[7] (See footnote 10).

[8] "247.01. Jurisdiction. The circuit courts have jurisdiction of all actions affecting marriage and of all actions under s. 52.10 (or concurrent jurisdiction where other courts are vested with like jurisdiction), and have authority to do all acts and things necessary and proper in such actions and to carry their orders and judgments into execution as prescribed in this chapter. All such actions shall be commenced and conducted and the orders and judgments therein enforced according to these statutes in respect to actions in circuit court, as far as applicable, except as provided in this chapter and in s. 52.10."

includable in the income of (Jean Wright) for income tax purposes nor deductible from the income of (William Wright) for income tax purposes."

The amended judgment was signed by the clerk on March 3, 1978.

The Wisconsin Court of Appeals held that the trial court was without authority to enter the order and judgment appealed from, either under the provisions of sec. 247.01, Stats., or under sec. 247.32, and reversed. The matter is now before us on review.

There are two principle questions on review:

1. Did the circuit court have authority under sec. 247.01, Stats. 1977, to order payment of an additional $102,840 to Jean Wright under the theory it was merely enforcing the original divorce judgment?

We conclude that it did not have such authority.

2. Did the circuit court have authority under sec. 247.32, Stats. 1967, to modify the original divorce judgment to provide for additional alimony?

We conclude the answer is no.

1. *DID THE CIRCUIT COURT HAVE AUTHORITY UNDER SEC. 247.01 STATS. 1977, TO ORDER PAYMENT OF AN ADDITIONAL $102,840 TO JEAN WRIGHT UNDER THE THEORY IT WAS MERELY ENFORCING THE ORIGINAL DIVORCE JUDGMENT?*

[1-3]

In the case of *Rotter v. Rotter, supra,* relied on by the trial court, the husband had failed to comply with explicit language of the divorce judgment in which he was ordered to cooperate in the conversion of health insurance coverage for his ex-wife. He assured her that he would do so. As a result of her reliance on the court order and his promise she incurred substantial medical bills. The husband had allowed the

policy of insurance to lapse. The circuit court ordered the husband to pay the medical bills and this Court upheld its authority under sec. 247.01, Stats. This Court pointed out that that statute vests in the trial courts the authority to do all things necessary and proper to carry their orders and judgments into execution. This Court held that the order was necessary to give effect to the divorce judgment and to protect the wife from the loss occasioned by the inaction of the husband. The Court pointed out that without such authority the provisions of the judgment would have been of no effect. But it is apparent that the present case presents an entirely different set of circumstances than those confronting this Court in *Rotter.* William Wright has complied with the original judgment. He has made payments over ten and one-half years totalling $228,000. The judgment has been complied with. A judgment is to be construed as of the time of its entry. Callaghan's, *Wisconsin Pleading And Practice,* sec. 37.49 (1978). Judgments are to be construed in the same manner as other written instruments. *Vaccaro v. Vaccaro,* 67 Wis.2d 477, 482, 227 N.W.2d 62 (1975). A judgment that is clear on its face is not open to construction but if it is ambiguous, construction is allowed and the court will consider the whole record, including pleadings, findings of fact and conclusion of law, and the judgment itself. *See, Lally v. Lally,* 152 Wis. 56, 138 N.W. 651 (1913); *Estate of Boyd,* 18 Wis.2d 379, 381, 118 N.W.2d 705 (1963). But the judgment entered in 1967 is not ambiguous as to its terms. The judgment provided for the payment of $228,000 over ten and one-half years. The trial court adopted the wife's findings of facts and conclusions of law and the judgment was based thereon.

Counsel for the wife did contend at the December 8, 1967 hearing that the findings submitted in her behalf and which the trial court adopted would have the

legal effect of excluding the payments from her income and barring a deduction for William Wright. The United States Court of Appeals for the Seventh Circuit, as cited above, disagreed. The trial court at the time of the findings and conclusions made no reference to income tax liability. Counsel for the wife argues that the trial court must be presumed to have meant that the wife should not have to pay because in *Wetzel v. Wetzel*, 35 Wis.2d 103, 110, 150 N.W.2d 482 (1967), this court said:

"We think in making a division of property or in granting alimony, or both, that consideration should be given to the tax consequences. Disregarding the effect of taxes may result in an unrealistic and unjust result. We do not hold that the trial court must adopt as a solution a method which produces the least amount of tax for the husband or for the wife, but in arriving at a determination of the business side of the divorce the tax impact is a consideration which permeates the whole process. . . ."

However, the duty placed on the judge in *Wetzel* involved a contested divorce in which the division of property, both as to the amount and the form of division, was made by the trial court. In the case before us, the division, both as to amount and form, was made by the parties by stipulation in open court. The findings of fact and conclusions of law were in the form submitted by Jean Wright's counsel and the court at her request adopted those findings and conclusions.

[4, 5]

Counsel when entering into a divorce stipulation has the duty to consider tax consequences to his client. The trial court is obliged to consider income tax consequences in a property stipulation. *Wetzel, supra.* Failure of a trial court to consider tax consequences may constitute an abuse of discretion. But time for appeal from

a judgment for abuse of discretion has long since expired in this case. The record here shows the trial court was aware that taxes were a factor to be considered.

Secs. 71(a)(1) and 215 of the Internal Revenue Code were adopted in 1942 in order to clarify the treatment of property divisions and support payments as a consequence of divorce. M. Chirelstein, *Federal Income Taxation*, §9.03 (1977). The judgment was silent as to any intended income tax consequences.[9] The definition of alimony and property division under state law is not the same or co-extensive with the provisions for periodic and installment payments under the Internal Revenue Code. In *Seiler v. Seiler*, 48 Wis.2d 400, 180 N.W.2d 627 (1970), the wife sought relief from a property division which would constitute periodic payments under sec. 71 Internal Revenue Code. Even though it was a property division under Wisconsin law, and so referred to in this Court's opinion, it was also a periodic payment under the Internal Revenue Code, includable in the wife's income for federal income tax purposes.

[6]

If there is no ambiguity on the face of the stipulation or judgment, the subjective intent of the parties is irrelevant. "Because a judgment is to be construed like any other instrument, . . . resort to the subjective intent of the parties is irrelevant." *Vaccaro v. Vaccaro, supra*, at 483; *Miller v. Miller*, 67 Wis.2d 435, 441–442, 227 N.W.2d 626 (1975).

Because the husband in the case before us had fully complied with the judgment, sec. 247.01, Stats., did not apply.

[9] "Generally speaking, payments continuing for more than 10 years from the date of the divorce decree or separation agreement are considered periodic payments, even though a lump sum total is specified." E. Griswold & M. Graetz, *Federal Income Taxation*, p. 833 (1976).

II. *DID THE CIRCUIT COURT HAVE AUTHORITY UNDER SEC. 247.32, STATS. 1967, TO MODIFY THE ORIGINAL JUDGMENT TO PROVIDE FOR ADDITIONAL ALIMONY?*

In a memorandum decision entered on December 20, 1977, the circuit court concluded that the original judgment did provide for certain items of alimony and thus were modifiable. These items were: a provision requiring William to pay a portion of Jean Wright's medical expenses; a provision requiring William Wright to maintain a life insurance policy on his life with Jean Wright as the beneficiary, and a provision that William Wright pay certain investment expenses incurred by Jean Wright. All were to terminate on the death or remarriage of Jean Wright. She argues these were payments in the nature of alimony thereby leaving the divorce judgment open to revision under the provisions of sec. 247.32.[10]

[10] Sec. 247.32, Stats., was amended in 1972 to provide that a judgment which fails to allow for alimony or only grants alimony for a limited time may not thereafter be modified as to the alimony award, but it also provided that it would only be effective for judgments rendered or granted after the effective date of the Act, April 12, 1972. §12, Chapter 220, Laws of 1971, effective April 12, 1972. Since the original judgment of divorce in this case was granted in 1968 this limitation does not apply. *Moore v. Moore*, 89 Wis.2d 665, 278 N.W.2d 881 (1979).

Sec. 247.32, Stats. 1967, provides:

"247.32. Revision of judgment. After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid the court may, from time to time, on the petition of either of the parties and upon notice to the family court commissioner, revise and alter such judgment respecting the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the said matters which such court might have made in the original action. But when a final division of the property shall have been made under s. 247.26 no other provisions shall be thereafter made for the wife."

Thus, she argues that the circuit court's award of $102,840 could be made as alimony. It was also argued on her behalf that the definition of alimony is or should be the same as a periodic payment under §71 of the Internal Revenue Code.

However, the order amending the judgment and the amended judgment that counsel for Jean Wright asks this Court to uphold specifically says that the ordered payment of $102,840 is not alimony.

The Court of Appeals assumed without deciding, the maintenance of a life insurance policy and the payment of medical and investment expenses by William Wright, which were to terminate upon the death or remarriage of Jean Wright, were "in the nature of alimony." The court further found that even though these items might have been alimony, thus modifiable, the payment of $228,000 was a fixed amount for the division of estate and by definition non-modifiable. Implicit in this finding is that the modification of alimony, if allowed, would be limited to the scope of the original award, that is, medical, life insurance and investment expenses.

Even if it is to be assumed that the payments ordered to be made during Jean Wright's lifetime or until remarriage are "in the nature of alimony" it is clear that general alimony for the support of the wife was not given. These payments were for specific purposes and under the terms of the judgment, the circuit court did not retain jurisdiction to make an award to compensate for loss incurred by income taxes. Jurisdiction that may have been retained was limited to those specific items of life insurance, medical expenses and investment expenses. Jean Wright's counsel calls our attention to the case of *Burg v. Burg*, 1 Wis.2d 419, 85 N.W.2d 356 (1957), where a nominal amount of alimony was held to be sufficient for a later award of general alimony. However, the nominal award of alimony in *Burg* was made for the express purpose of retaining jurisdiction over alimony so that if

the need arose an award could be made in the future. It was a device designed to prevent the wife from being entirely foreclosed from receiving alimony.

In *Kronforst v. Kronforst*, 21 Wis.2d 54, 65–66, 123 N.W.2d 528 (1963), this Court said:

"There is no question but that, if the judgment is modified so as to retain jurisdiction over alimony, the county court will have jurisdiction to award alimony in the future to plaintiff upon an adequate showing of change of circumstances even though no alimony is presently awarded. . . However, it should be pointed out that a trial court should not reserve such jurisdiction to award alimony without stating its reasons for so doing. . . Such reasons may be stated in the memorandum decision, in the findings of fact, or the judgment. . . The trial court can effectively retain jurisdictions to award alimony in the future without in the meantime awarding alimony in a nominal amount, such as one dollar per month, as was done in *Hansen v. Hansen*, 259 Wis. 185, 49 N.W.2d 434 (1951), and *Burg v. Burg*, 1 Wis.2d 419, 85 N.W.2d 356 (1957)."

The original judgment in the case at bar entered in 1968 did not reserve jurisdiction to make a general alimony award as is required by *Kronforst, supra.* Paragraph twenty-second of the judgment states that alimony is denied and certainly negatives an intent on the part of the court to reserve the power to make a general award in the future.

[7]

Thus, to the extent that the award of insurance, medical and investment expenses constituted alimony, any modification of the original judgment should be constrained to those specific items. If it were held otherwise, a very limited provision for the payment of specific expenses of one spouse could later become the basis of a much larger general alimony award. This would have the effect of limiting the flexibility of the parties and the court in devising the settlement and judgment provisions.

It would be impossible to obtain the agreement of a spouse to pick up expenses such as these if it was known that gross modification could occur at a later date. Thus, the original judgment in this case demonstrates that the trial court considered the relative positions of the parties and decided against a reservation of jurisdiction for a general alimony award. The error in that judgment, if there was one, is not reviewable here since the time for appeal of that judgment has long since expired. *Anderson v. Anderson*, 8 Wis.2d 133, 98 N.W.2d 434 (1959); *see also, Steinkopf v. Steinkopf*, 165 Wis. 224, 161 N.W. 757 (1917). To the extent that the circuit court had jurisdiction to modify the alimony awarded for the insurance, medical and investment expenses, it was limited to those items and could not award $102,840 as general alimony on this ground.

Counsel for Jean Wright argues that if the installment payments are taxable under the federal law then they are also alimony under Wisconsin law. This argument would equate periodic payments under the Internal Revenue Code §71 with alimony under state law. Although the definitions and applications may overlap in many cases, they clearly are not co-extensive for all purposes and in all events. The Internal Revenue Code addresses itself to periodic and installment payments.[1] It is not

[1] "SEC. 71. *ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.* [Sec. 71(a)] (a) *GENERAL RULE*—(1) *DECREE OF DIVORCE OR SEPARATE MAINTENANCE*—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which because of marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation. . . .

the labels placed on the payments which are determinative under the federal tax law. It is the structure and effect of the payments which control the characterization. As has been stated:

"[a] number of cases deal with the distinction between alimony and property settlements. In approaching the issue, the [federal] courts have not always adopted the characterization of the payments given by the parties or the state court, but have considered *inter alia*, the nature of the negotiations between the parties, whether such payments are in lump sum, whether they are in addition to other support or maintenance payments specified in a decree or agreement and whether the wife has released any interest in property or other rights held by her prior to the divorce." L. Thomas Jr., *Tax Consequences Of*

"SEC. 71(c) *PRINCIPAL SUM PAID IN INSTALLMENTS* —(1) *GENERAL RULE*—For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

"(2) *WHERE PERIOD FOR PAYMENT IS MORE THAN 10 YEARS*—If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement then (notwithstanding paragraph (1) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received."

"SEC. 71(d) *RULE FOR HUSBAND IN CASE OF TRANSFERRED PROPERTY*—The husband's gross income does not include amounts received which, under subsection (a), are (1) includible in the gross income of the wife, and (2) attributable to transferred property."

Marriage, Separation And Divorce. ALI–ABA. Committee On Continuing Legal Education, pp. 118–119 (1976).

Under the terms of the divorce judgment in this case, William Wright was required to pay his ex-wife $228,000 in installments. The payments were not to end on her death or remarriage and the full amount was to be paid even if he had died before all payments had been made. The judgment called it a division of estate and division of property. Under Wisconsin law this was a property division and as such it is not subject to modification under our statutes. The Circuit Court lacked authority under sec. 247.32, Stats., to modify the original judgment.

By the Court.—The decision by the Court of Appeals is affirmed.

COFFEY, J., took no part.

WILLIAM G. CALLOW, J. *(dissenting).* The majority states "the judgment was silent as to any intended income tax consequences." Simultaneously, the majority recognizes that trial courts are obliged to consider income tax consequences in a property stipulation, *Wetzel v. Wetzel*, 35 Wis.2d 103, 110, 150 N.W.2d 482 (1967), and that the trial court in this case was aware that income tax considerations played a significant role; yet the majority concludes that the judgment unambiguously allocates to Jean Wright the income tax liability for the payments made by William to Jean. I cannot agree, and would find the judgment ambiguous as to the tax consequences of the payments to Jean Wright. Accordingly, I would remand this case to the circuit court for a determination of the original intent of the judgment.

Judgments are to be construed in the same manner as other written instruments, *Vaccaro v. Vaccaro*, 67 Wis.2d 477, 482, 227 N.W.2d 62 (1975), and are to be construed as of the time of entry. *Childs v. Dahlke*, 160 Wis. 184,

192, 151 N.W. 378 (1915). If reasonably or fairly susceptible to different constructions, a written instrument is ambiguous. *Lemke v. Larsen Co.*, 35 Wis.2d 427, 432, 151 N.W.2d 17 (1967).

Section 71(a)(1) of the Internal Revenue Code of 1954 provides that periodic payments are income to the ex-wife if they are received after a decree of divorce and in discharge of the husband's "legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation." This section "contemplates a payment made in pursuance of the husband's obligation of support and not in satisfaction of some property rights of the former spouse." *Van Orman v. C.I.R.*, 418 F.2d 170, 171 (7th Cir. 1969).

Under Section 71(c) of the Internal Revenue Code of 1954, installment payments discharging an obligation to pay a principal sum specified in the decree are not to be treated as "periodic payments" within the meaning of Section 71(a) unless the decree provides that the principal sum "is to be paid or may be paid over a period ending more than 10 years from the date of such decree," in which case the amount received constitutes a "periodic payment" with the meaning of Section 71(c)(2) "to the extent of 10 percent of the principal sum."

Therefore, to be includable under Section 71 in the gross income of the wife, the principal sum must be payable in installments over a period in excess of ten years and must be in discharge of an obligation of maintenance imposed under the decree of divorce because of the marital relationship. If includable in the gross income of the wife, the payments may be deducted by the husband. IRC Section 215.

Admittedly, the judgment is silent with regard to its tax consequences. But silence cannot be equated with

unambiguity, especially where we have stated "it seems more proper to presume the trial court followed the holding of *Wetzel v. Wetzel* than that it did not." *Seiler v. Seiler*, 48 Wis.2d 400, 406, 180 N.W.2d 627 (1970). Fears that this analysis allows ambiguity to be found whenever an instrument is silent on a particular point are exaggerated, for we can find support in the record that the point at issue here, the income tax consequences, was considered in the statement of the stipulation in open court.

In my view, the judgment is fairly susceptible to different constructions. Although installment payments executing the "property settlement" were to be made over a period greater than ten years, the trial court took the specific step of denying alimony. The decree of divorce, at least on its face, imposes no obligation of maintenance. Here Jean Wright had a sufficient personal estate to accommodate her support, and the court recognized this in approving that portion of the stipulation which provided there would be no alimony. Because the parties had been married nineteen years, Jean was entitled to the portion of their accumulated estate in the sum of $228,000. I do not think it unreasonable to view the judgment as intending that Jean Wright receive $228,000 as a division of property, free of income tax liability. Nor is it entirely unreasonable to view the judgment as contemplating a division of property on the basis of the parties' respective property ownership at the time of divorce, plus payments for Jean's maintenance to be made over a period of ten and one-half years. As noted by the United States Court of Appeals, this is "a close and difficult case." *Wright v. Com'r of Int. Rev.*, 543 F.2d 593, 598 (1976).

Because I would find ambiguity in the original judgment, I would reverse the decision of the court of appeals and remand the case to the circuit court. While normally the circuit court's later judgment favoring Jean Wright should not be disturbed if the "great weight and clear

preponderance of the evidence is not against the circuit court conclusion," *Rotter v. Rotter*, 80 Wis.2d 56, 61, 257 N.W.2d 861 (1977), the circuit court's hearing did not address ambiguity in the original judgment and instead considered Jean Wright's current financial position, tax liability, and health. That is inconsistent with *Childs v. Dahlke, supra.* Accordingly, I would remand this case with directions that the circuit court hear evidence as to the original intent of the judgment.

IN MATTER OF ESTATE OF JACOBS, Deceased: TILG, Personal Representative of the Estate, Appellant, v. DEPARTMENT OF REVENUE, Respondent.

Supreme Court

No. 77-162. Argued October 8, 1979.—Decided November 6, 1979.

1. Taxation §548*—inheritance tax—basis and determination of tax.
Inheritance tax is tax on right to receive property and amount of tax is determined according to relationship of parties, rate, and value of each transfer or gift from decedent.

2. Taxation §558*—inheritance tax—property subject to tax—need not be part of decedent's estate.
Property need not become part of deceased's estate in order for it to be subject to inheritance tax.

3. Wills §169.5*—joint will—disposal of assets by survivor—terms of contract control.
Terms of contract control right of survivor to dispose of assets acquired under joint contractual will.

4. Wills §169.5*—joint will—disposal of assets by survivor—intent of parties at time of entering into will.
Intent of parties at time will is entered into governs right of survivor to dispose of assets acquired under will.

* See Callaghan's Wisconsin Digest, same topic and section number.

No. 77-686
STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

WILLIAM C. WRIGHT,

Plaintiff-Appellant,

v.

JEAN WRIGHT, Defendant-Respondent.

APPEAL from an order and judgment of the circuit court for Milwaukee county: ROBERT M. CURLEY, Circuit Judge. Reversed and remanded with directions.

Before Decker, C.J., Cannon, P.J., and R.W. Hansen, Reserve Judge. DECKER, C.J.

William and Jean Wright were divorced in October, 1967. The divorce judgment provided in pertinent parts:

Twenty-first. That alimony be and hereby is denied.

***

Twenty-fourth. That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff be and he hereby shall pay to defendant the sum of $228,000.00 within ten and one-half (10-1/2) years of the date of this judgment; and payable on the following terms: No less than $2,000.00 per month be paid by plaintiff to the defendant for the first six months; that thereafter the plaintiff shall pay to the defendant no less than the sum of $1,800.00 per month for the balance of the term of payment of $228,000.00 specified herein.

The payment provisions had been orally stipulated by the parties. Difficulty arose, however, as to the language to be utilized in the judgment because of the income tax consequences of the judgment provisions. Both parties submitted proposed findings of fact and conclusions of law and the trial court (Judge L. J. Foley, Jr.) adopted those submitted by the wife as set out above.

The husband's proposed findings stated that the property division payments were to be made "in lieu of alimony." In proposing

such language the husband meant to bring the payments within the provisions of Section 71, I.R.C. (1954). Under the provisions of that code section, alimony payments or payments "in lieu of alimony"[1] are periodic payments which constitute taxable income for the person receiving them and a deduction for the person making such payments. As noted above, the trial court, without explanation, rejected the "in lieu of alimony" language and specifically provided the payments were to complete the division of property.

Jean Wright did not report the payments made as taxable income in 1968, 1969 and 1970. William Wright claimed the payments as deductions against his taxable income in those years. The Commissioner of Internal

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[1] See Marion R. Hesse (1973), 60 T.C. 685.

Revenue made deficiency determinations as to both parties and sought a determination whether the payments were actually "periodic payments ... in discharge of ... a legal obligation which, because of the marital or family relationship is imposed on or incurred by the husband under the decree ..." Section 71, I.R.C. (1954). In William C. Wright (1974), 62 T.C. 377, aff'd, Wright v. Com'r. of Int. Rev., 543 F.2d 593 (7th Cir. 1976), the court held that it was not bound by the label placed on the payments by the state decree and that the payments were periodic payments. As a result, Jean Wright was found to be delinquent in her income tax payments in the amount of $102,840.

Jean Wright subsequently filed a petition to modify the divorce judgment by the allowance of additional alimony. The family

court commissioner determined that he was without jurisdiction to make such an order by virtue of sec. 247.32, Stats. (1975)[2] and dismissed the petition. Petitioner then applied to the circuit court for a de novo review of the court commissioner's determination, requesting that the circuit court modify the judgment to provide for additional alimony or, in the alternative, enforce the original judgment "to wit: the receipt of $288,000 without any diminution by income taxes."

On review, Judge Curley determined that the circuit court had jurisdiction to entertain the motion for modification of judgment and ordered William Wright to pay Jean Wright $102,840 within sixty days of entry

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[2] Infra, n. 5. Note: All subsequent statutory references are to the provisions of Wis. Stats. (1975).

of the order. Although it is clear that the court found that certain provisions of the original decree were for alimony and the judgment could therefore be modified under sec. 247.32, Stats., the court stated it relied upon the power "inherent in this court under the authority recently propounded in Rotter v. Rotter, 80 Wis.2d 56."[3]

We hold that the court was without jurisdiction to enter the order appealed from either under the provisions of sec. 246.01, Stats., or sec. 247.32, Stats., and reverse.

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[3] In Rotter v. Rotter, 80 Wis. 2d 56, 62, 257 N.W.2d 861 (1977), the Wisconsin Supreme Court distinguished between an order modifying a judgment of divorce under sec. 247.32, Stats. (1975), and an "order ... properly entered for the enforcement of the divorce judgment" under sec. 247.01, Stats. (1975). Sec. 247.01, Stats., provides that the trial courts have authority to "do all ... things necessary and proper ... to carry their orders and judgments into execution ..."

Power to Enforce Judgment

The trial court concluded that the order it entered was justified by virtue of the provisions of sec. 247.01, Stats. The statute, however, presupposses a condition precedent to the exercise of the inherent power set out therein: that the provision of the order or judgment of the court has not been executed.

The trial court was not faced with that circumstance. The provision of the original divorce judgment for payment of $228,000 was fulfilled by the appellant and there was no need for a subsequent order or amended judgment to execute the original judgment.

The defendant maintains that the circumstances surrounding the entry of the original judgment demonstrate the clear intent of the trial court to provide her with the net amount of $228,000 from the husband's estate. The heart of the argument is that

the judgment would have provided an additional sum if the trial court had been aware at the time of judgment that the property division payments would be found to be taxable income. Since the amount received was taxed, Jean Wright claims the judgment was not executed.

The default divorce hearing in this case was based upon an oral stipulation of the parties. After the divorce judgment was granted, the attorneys for the parties were unable to agree upon proposed findings of fact and conclusions of law because they disagreed upon the income tax consequences of the stipulation. That disagreement was made known to Judge Foley and differently worded proposed findings and conclusions were submitted to him. The trial court executed the findings and conclusions prepared by the attorney for Jean Wright which were in conformity with the oral stipulation.

"Judgments are to be construed like other written instruments." R.B. General Trucking v. Auto Parts & Services, 3 Wis.2d 91, 98, 87 N.W.2d 863 (1958).

> (T)he office of judicial construction is not to make contracts or to reform them, but to determine what the parties contracted to do; not necessarily what they intended to agree to, as evidenced by the language they saw fit to use. Wisconsin Marine & Fire Ins. Co. Bank v. Wilkin, 95 Wis. 111, 115, 69 N.W. 354 (1897) quoted in Miller v. Miller, 67 Wis.2d 435, 442, 227 N.W.2d 626 (1975).

The language of the original divorce judgment obligated the plaintiff to pay $228,000 to the defendant to complete the division of property between the parties. The Plaintiff complied with that provision of the judgment and there was no basis for a further order to carry into execution a fully executed provision of the judgment.

Power to Modify Judgment

In its memorandum decision the trial court adopted the position of the defendant that because some of the provisions of the original judgment were in the nature of alimony,[4] the judgment, in its entirety, was subject to modification under the provisions of sec. 247.32, Stats., [5] although it did not rely upon that statute in making its decision.

Section 247.32, Stats., authorizes modification of provisions for alimony contained in a judgment of divorce. As the Wisconsin Supreme Court stated in Gray v. Gray, 240 Wis. 285, 287, 3 N.W.2d 376 (1942): "The provision for alimony may be revised from time to time but the division of the estate is fixed for all time. Sec. 247.32, Stats."[6]

The judgment provision for payment of $228,000 in monthly installments specified that it was "as and for a complete division of estate and to complete the division of property between the parties." The order appealed from invalidly modified the provision. Assuming the medical, investment and life insurance costs were in the nature

[4]Plaintiff was required to pay a portion of respondent's medical expenses and investment expenses until her remarriage or death and maintain a policy of insurance upon his life where in defendant was named as beneficiary.

[5]Sec. 247.32, Stats. (1975), provides:

> Revision of judgment. After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid the court may, from time to time, on the petition of either of the parties and upon notice to the family court commissioner, revise and alter such judgment respecting the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the said matters which such court might have made in the original action. But when a final division of the property shall have been made under Sec. 247.26 no other provisions shall be thereafter made for the wife.

[6]Unless the application is grounded upon sec. 806.07, Stats., ordinarily, within one year.

of alimony, [7] they were subject to modification under sec. 247.32, Stats. Payments to complete the division of property were not.

By the Court:--Judgment and order modifying the original divorce judgment reversed. Cause remanded for proceedings consistent with this opinion.

Recommendation: No publication.

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[7] A question we need not reach.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

WILLIAM C. WRIGHT,

Plaintiff,

vs.

JEAN WRIGHT,

Defendant.

MEMORANDUM DECISION

This matter is before the Circuit Court on the defendant wife's motion to modify the judgment to provide for additional alimony, or, in the alternative, to enforce the judgment.

The original judgment was entered by the Hon. Leander J. Foley, Jr., Judge of the Circuit Court of Milwaukee County, on October 4, 1967. On February 10, 1977, the defendant, Jean Wright, obtained an Order to Show Cause, signed by the Hon. Glen W. Ploetz, Assistant Family Court Commissioner of Milwaukee County, Wisconsin. This order directed the plaintiff and petitioner, William C. Wright, to show cause why the judgment should not be

modified to provide for "additional alimony" payable by the plaintiff to the defendant. This order was returnable April 27, 1977. On July 1, 1977, the matter was heard before the Hon. William F. Duski, Assistant Family Court Commissioner. Assistant Family Court Commissioner Duski, after consideration of the briefs and arguments presented by counsel for the respective parties, denied the defendant's motion for additional alimony and held that a judgment of divorce cannot be revised if that judgment makes no provision for alimony. He concluded that the judgment of divorce in the original action here provided for only property settlement and not alimony; consequently, that judgment could not be disturbed. This matter is now before this court because the defendant wife moved for a review of the Family Court Commissioner's decision.

This court has had the benefit of perusing the original judgment, the transcript and findings of

fact and conclusions of law. Testimony and oral argument was had before this court on September 12, 1977, wherein the defendant, Jean W. Wright, testified. 20 exhibits were offered and received. Oral argument was presented by Mr. Bruce C. O'Neill on behalf of the defendant wife, and by Mr. Robert E. Cook on behalf of the plaintiff husband. Mr. Gerald J. Kahn also argued on behalf of the plaintiff husband. The defendant wife testified at the hearing, held before this court on September 12, 1977, as to her claimed changed circumstances; namely, that the income tax liability changed her circumstances because her assets were the same as they were at the time of the divorce, which consisted primarily of a farm she owned and certain modest-yield securities with the income from such assets, in all respects, being modest.

This court has also had the benefit of the inspection of Circuit Court Case No. 435-823, which was a later divorce action between this plaintiff and his second wife, Ellen Wright, in which the

plaintiff's financial declaration showed that he had a net worth of approximately $3,000,000.00, and an annual income of approximately $100,000.00. Further, this court has had the benefit of perusing the decisions from the U.S. Tax Court controversy which ultimately led to the parties being back before this court.

The contentions of the defendant wife are that a Wisconsin judgment of divorce can provide for both alimony and property division; that both Wisconsin and Federal Income Tax Laws define alimony payments as support payments; that this court would have made the payments "in lieu of alimony" if it had intended that the payments be taxable to the wife; that since the court, that is to say, Judge Leander J. Foley, Jr., in his decision, chose not to use the phrase "in lieu of alimony" as to the payments in paragraph 26 of the judgment and adopted the conclusion of law proposed by the attorney for the wife, therefore, there can be no doubt that it was the intent of the Circuit

Court back in 1967, at the time of the granting of the judgment of divorce, that the payments required under that judgment were not to be taxable to the wife and that the wife finds herself in the predicament of now owing approximately $102,840.00 in additional taxes because of the skill of the plaintiff in the Federal Courts where he was able to convince those courts, despite the Divorce Court having stated that "Alimony be and hereby is denied," despite the Divorce Court having stated that the payments were "for a complete division of estate and to complete the division of property of the parties," and despite the Divorce Court having refused to use the term "in lieu of alimony" as to such payments, that such payments were really support payments.

It is further contended by the defendant wife that since this is a court of equity it can remedy the injustice being imposed by the plaintiff on his ex-wife by this court finding that it intended the payments under paragraph 26 of the judgment to be

tax free to the wife and requiring the husband to provide the wife with money so that she can offset her tax liability on such payments by either of the following means: (a) Finding that this court has jurisdiction to modify the judgment on the basis that the payments under paragraph 26 of the judgment are for alimony and then modifying the judgment to provide the wife with additional alimony so that she can pay her taxes; or (b) Enforcing the judgment by ordering the husband to pay additional money so that she will have received $228,000.00 after taxes; in other words, a net to her of $228,000.00.

It is further contended by the defendant wife that this court does in fact have jurisdiction to enforce this judgment regardless of whether or not it contains any provision for alimony.

The plaintiff husband, on the other hand, contends, among other things, that this court lacks jurisdiction to now make such amendment as is proposed by the defendant wife's counsel, and that,

because of Section 247.23 of the Wisconsin Statutes, which directs that a judgment of divorce providing only for division of property and not for alimony may not thereafter be revised or modified, that this court is powerless to make any such modificiations as requested by the defendant wife; and that the court, therefore, lacks statutory jurisdiction to reopen such judgment. Great emphasis is placed upon the actions taken in the Federal Tax Court. This court can only say in this regard that it is not bound by any decisions made by the Federal Tax Court any more than that court would be bound by decisions made by this court, and that this court will consider those actions insofar as they have operated to reduce the defendant wife's settlement of $228,000.00 by a sizable sum; to-wit, $102,840.00.

This court finds Assistant Family Court Commissioner Duski, in making his decision of July 1, 1977, did in fact abuse his discretion by making such decision. This court finds that Section 247.32, Wis. Stats., is not controlling inasmuch as the

judgment provides, among other things, at paragraph Twenty-first: "That the plaintiff shall be liable for all health, medical, and reasonably related expenses that the defendant may incur except for the first $250.00 per year and for said first $250.00 of said expense the defendant shall be liable; said liability shall terminate upon defendant's remarriage." While it is true this may have been a final division of estate, and it would appear that perhaps it was a prima facie property settlement, here the added factor that the payment of health, medical, and reasonably related expenses would be terminated upon the defendant wife's remarriage is more a characteristic of alimony and not of a property settlement, according to the rationale in Fritschler v. Fritschler, 60 Wis. (2d) 283, 291.

This court also concludes that the provisions in paragraph Twenty-third of the judgment, providing that the plaintiff, William C. Wright, shall maintain the present $200,000.00 of life insurance, being with the Northwestern Mutual Life Insurance Company,

Policy No. 5 531 595, date of issuance, August 22, 1963, of which the defendant is owner in full force and effect and shall maintain the defendant as beneficiary thereon for as long as said policy shall provide and at least to age 65 and shall keep the defendant as beneficiary of all the proceeds of said policy until she dies or remarries, also has the characteristics of alimony and not a property division.

The court also finds that those provisions under paragraph Twenty-fifth of the judgment that say with respect to financial counsel, which is named "Fiduciary Counsel, Inc." which manages the defendant wife's investment portfolio, and that the expenses thereof exceeding $100.00 per year shall hereby be paid by the plaintiff husband, and that this management shall terminate upon the defendant's death or remarriage, has the characteristics of alimony.

Therefore, it is the order of this court that the judgment shall be amended to provide

that the plaintiff husband pay to the defendant wife, within sixty days of this order, the sum of $102,840.00, which will have the net effect of restoring to her the exact amount lost by her because of the rulings of the United States Courts. The authority to make this order is, in the court's opinion, inherent in this court under the authority recently propounded in Rotter v. Rotter, 80 Wis. (2d) 56. For the sake of this Circuit Court case, it is intended that the $102,840.00 not be taxable to the defendant wife; otherwise, she would not be restored to the position that it is this court's opinion she was intended to be in by the original judgment entered by the Hon. Leander J. Foley, Jr. on October 4, 1967.

Dated, at Milwaukee, Wisconsin, this 20th day of December, 1977.

BY THE COURT

Robert M. Curley
Circuit Judge

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 75-1170 through 75-1176

JEAN W. WRIGHT,

Petitioner-Appellant,
(Cross-Appellee),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee,
(Cross-Appellant).

WILLIAM C. WRIGHT and ELLEN W. WRIGHT,

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant
(Cross-Appellee).

Appeal from the Tax Court of the United States
Nos. 830-72, 1356-72, 1991-72 and 4104-72

ARGUED SEPTEMBER 9, 1975—DECIDED OCTOBER 28, 1976

Before STEVENS, *Circuit Justice,** FAIRCHILD, *Chief Judge* and CAMPBELL, *Senior District Judge.***

CAMPBELL, *Senior District Judge.* These appeals are taken from a single decision of the United States Tax Court rendered in four consolidated cases[1] wherein petitioners challenged certain federal income tax deficiency determinations made by the Commissioner of Internal Revenue.[2] The issues on appeal are those which were before the Tax Court:

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* Mr. Justice Stevens participated initially as Circuit Judge; on and after December 19, 1975, he participated as Circuit Justice.

** Senior District Judge William J. Campbell of the United States District Court for the Northern District of Illinois is sitting by designation.

[1] *William C. Wright and Ellen W. Wright v. Commissioner* (No. 830-72); *William C. Wright and Ellen W. Wright v. Commissioner* (No. 4104); *Jean W. Wright v. Commissioner* (No. 1356-72) and *Jean W. Wright v. Commissioner* (No. 1991-72).

[2] The Commissioner took inconsistent positions in his deficiency determinations against petitioners, thus insuring the recovery of back taxes from whichever taxpayer was determined by the Court to be liable. Thus, he determined deficiencies against William C. and Ellen W. Wright for the years 1968, 1969 and 1970 in the amounts of $8,603.13, $14,963.76 and $14,367.14, respectively, while also determining deficiencies against Jean W. Wright, for the same years, in the amounts of $6,667.59, $7,330.41 and $7,093.34, respectively. The inconsistency arises from the fact that, in each instance, the correctness of the Commissioner's ruling rests on whether or not certain payments made by William were income to Jean under section 71 (a) and therefore deductible by William under section 215. To the extent that they are, the deficiency against Jean is correct and that against William is incorrect. On the other hand, to the extent that such payments are not income to Jean, neither are they deductible by William, in which event the Commissioner's deficiency determination is correct as to William and incorrect with respect to Jean.

As the Commissioner's brief indicates, his cross-appeals to this Court "are for protective purposes only."

"(1) Whether the cash payments made by William C. Wright during the calendar years 1968, 1969, and 1970 to his former wife, Jean W. Wright, are includable in her gross income for such years as alimony under the provisions of section 71, I.R.C. 1954,[3] and consequently deductible for such years by William C. and Ellen W. Wright under the provisions of section 215; and

(2) Whether annual premiums paid by William C. Wright during the calendar years 1968, 1969, and 1970 on a term life insurance policy owned by his former wife, Jean W. Wright, are includable in her gross income for such years as alimony under the provisions of section 71 and consequently deductible for such years by William C. and Ellen W. Wright under the provisions of section 215."

In the Tax Court, the parties stipulated to all facts relevant to a determination of the foregoing issues. Those facts have been set forth in the Tax Court's opinion, and may be summarized as follows:

William C. Wright (William) and Jean W. Wright (Jean) were married in Milwaukee, Wisconsin on January 31, 1948. In 1967, William filed for divorce and for custody of their minor children. Jean filed a counterclaim seeking a divorce, alimony, a division of property, attorneys' fees, costs, and custody of the children. On October 4, 1967, the action for divorce came to trial, the parties having elected to proceed on Jean's counterclaim. The parties entered into a stipulation in open court with regard to the disposition of property owned by each of them, custody of their children, alimony, attorneys' fees and court costs. In all pertinent respects, the stipulation of the parties was accepted and adopted by Judge L. J. Foley, Jr. of the Circuit Court for Milwaukee County, Wisconsin in his findings of fact, conclusions of law and judgment orally made at the hearing and included as part of the transcript thereof. The court found, on the basis of her counterclaim, that Jean was "entitled to an absolute divorce."

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[3] All references are to the Internal Revenue Code of 1954.

The parties stipulated that their combined net worth was $1,065,122.00. Of this amount, assets worth $227,752.00, consisting of property which was either inherited from her mother or purchased with the proceeds of that inheritance, were owned by Jean. The remaining assets, valued at $837,370.00, had been purchased and were owned by William.

At the divorce hearing, Jean acknowledged under oath that she understood alimony was to be denied; William acknowledged that he understood there was to be a full and complete division of estate in lieu of any claim upon him by Jean for alimony.

Subsequent to the hearing, Jean's attorney submitted proposed findings of fact and conclusions of law, including the following:

> "Twenty-first. That alimony be and hereby is denied.
>
> * * *
>
> Twenty-fifth. (a) That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff shall pay to the defendant the sum of $228,000.00 within ten and one-half (10-1/2) years of October 4, 1967, . . .".

William subsequently objected to these proposed findings of fact and conclusions of law, contending that they did not conform with his understanding of the parties' stipulation. His attorney submitted an alternate conclusion of law which stated:

> "25a That alimony be and hereby is denied and in lieu of said alimony and in full satisfaction of any claim therefore, and as a complete division of estate and to complete the division of property of the parties, the plaintiff shall pay to the defendant the sum of $228,000.00 in 10-1/2 years of entry of judgment, said sum to be paid at the rate of $2,000.00 each month for a period of six months and $1,800.00 each month thereafter for a period of 10 years."

Jean's attorney argued that the lump sum payment of $228,000.00 constituted a division of the estate, not alimony, and that at the time the 10-1/2 year period was agreed upon, she did not consider the payment as alimony and would not report it as such. William's attorney argued that the 10-1/2 year period provided for in the stipulation was designed to permit William an income tax deduction for the payments made over that period of time.

On January 29, 1968, the court entered its findings of fact and conclusions of law, including the following:

> "Twenty-second. That alimony be and hereby is denied.
>
> Twent-third. [sic] That the plaintiff, William C. Wright, shall maintain the present $200,000.00 of life insurance, being with the Northwestern Mutual Life Insurance Company. Policy No. 5 553 595, date of issuance, August 22, 1963 [sic], of which the defendant is owner in full force and effect and shall maintain the defendant as beneficiary thereon for as long as said policy shall provide and at least to age 65 and shall keep the defendant as beneficiary of all the proceeds of said policy until she dies or remarries; that if there are any proceeds of this insurance that the defendant collects, whatever is not used by the defendant in her lifetime shall be left at the time of her death to the children of the parties, either by her will or by trust or by separate trusts in her will.
>
> * * *
>
> Twenty-sixth. (a) That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff . . . shall pay the defendant the sum of $228,000.00 within ten and one-half (10-1/2) years of October 4, 1967; . . .".

The decree then set forth the terms under which the $228,000.00 was to be paid, requiring that William make payments of not less than $2,000.00 per month for the first six months, and no less than $1800.00 per month over a 10½ year period, until the full $228,000

has been paid. The divorce decree further provided that payment of this sum was to be secured by sufficient marketable securities in the investment portfolio awarded to William, and that said securities were to be placed in escrow under terms and conditions suitable to secure the payment of the money awarded to Jean. In the event of William's death prior to full payment of the $228,000.00, Jean was to be paid promptly the balance due, either from the estate of William C. Wright or from the escrow account, unless the estate "is not liquid or is insolvent, or impaired in any manner," in which event the balance due was to be paid from the escrow account.

The value of the assets awarded to Jean under the divorce decree, including the present value of the $228,000.00 lump sum payment, was determined to be $459,018.00. The value of the assets awarded to William was determined to be $606,104.00. In May of 1968, the parties executed a mutual release which, in part, stated: "WHEREAS, said judgment of divorce which was entered February 2, 1968 provided for, among other things, a property settlement between the parties in lieu of alimony; . . .".

During the calendar years 1968, 1969 and 1970, William paid Jean $22,200.00, $21,600.00, and $21,600.00, respectively, as installments on the principal sum of $228,000.00. He also paid in those years, respectively, $1,505.50, $1,459.50, and $1,415.50 to Northwestern Mutual Life Insurance Company as premiums on the $200,000.00 term life insurance policy referred to in the twenty-third paragraph of the decree.

The Tax Court determined that the installment payments made by William to Jean should have been included in Jean's gross income for the years 1968, 1969 and 1970, pursuant to section 71, and that William was entitled to deduct the amounts of said payments for those years pursuant to section 215(a). The court further held "that Jean did not constructively receive an economic benefit under the [insurance] policy and no amount is includable in her income because of the payments of the premium on this policy by William." Accordingly, the premiums paid were held not to be income to Jean, and not deductible by William.

On appeal, Jean contends that the Tax Court erred in construing the installment payments as "periodic payments" within the meaning of section 71(a), and therefore taxable income to her. William contends that the court erred in holding that no part of the insurance premiums constituted income to Jean, thus disallowing his claim to deductions under section 215.

Section 71 provides that where "periodic payments" are received by a divorced wife from her former husband subsequent and pursuant to a decree of divorce "in discharge . . . of a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree . . .", such payments are included in the wife's gross income.

Under Section 71(c), installment payments discharging an obligation to pay a principal sum specified in the decree are not to be treated as "periodic payments" within the meaning of Section 71(a) unless the decree provides that the principal sum "is to be paid or may be paid over a period ending more than ten years from the date of such decree . . .", in which event the amount received constitutes a "periodic payment" within the meaning of Section 71(a) "to the extent of 10 percent of the principal sum." Under Section 215, the husband may deduct "amounts includable under Section 71 in the gross income of his wife. . . ."

Thus, to be includable under Section 71 in the gross income of the wife, the principal sum must be payable in installments over a period in excess of ten years (Section 71 (c)(2)) and must be in discharge of an obligation imposed under the decree because of the marital relationship (Section 71(a)). This latter requirement "contemplates a payment made in pursuance of the husband's obligation of support and not in satisfaction of some property rights of the former spouse." *Van Orman v. Commissioner*, 418 F. 2d 170 (7th Cir. 1969).

The Tax Court held that the principal sum ($228,000.00) could be paid in installments over a period of 10½ years and that these installments therefore constituted "periodic payments" for the purposes of Section 71(a). The Court further held that William's obligation to so compensate Jean was due to "their marital and

family relationship", i.e. pursuant to William's obligation of support rather than in satisfaction of Jean's property rights.

On appeal, Jean challenges both of these findings. She argues that the record is silent as to her need for support, that she had substantial property of her own and that the divorce court's decree reflects an intention that the payments be part of a property settlement, not contributions toward her support. She also notes that the payments were not subject to the contingencies of death or remarriage, and were secured. The Tax Court's decision, she contends, also ignores two decisions of this Court, *Van Orman v. Commissioner*, *supra*, and *Houston v. Commissioner*, 442 F.2d 40 (7th Cir. 1970).

In holding that the payments "were intended by the parties to be payments in discharge of a legal obligation which was imposed on her former husband, William, because of the marital relationship", the Tax Court correctly observed that the question of whether payments are made in recognition of the general obligation to support or in settlement of a wife's property rights depends upon the facts and circumstances of each case. The use of a particular label in the divorce decree or settlement agreement is not conclusive; nor is any other factor irrebuttable proof of the parties' intentions. While we consider this a close and difficult case, we have concluded that the Tax Court's determination should be upheld.

Among the factors which we believe supportive of this conclusion is the fact that the $228,000.00 awarded to Jean was obviously not paid in exchange for tangible property owned by her at the time of divorce. That property, valued at $227,752.00, was separately awarded to her under the decree. In addition, she received property owned by William consisting of furnishings valued at $20,000.00, two automobiles and the discharge of her liabilities in the amount of $41,266.00.

In response to Jean's contention that the $228,000.00 was paid in exchange for her inchoate rights to her husband's property, the Tax Court held that such rights do not establish co-ownership of the property held in the husband's name, and from this premise seems to have

concluded that the loss of inchoate rights through divorce cannot support a division of property. Thus, the Court concluded that "Jean did not surrender any property interests or give up anything that is recognized as supporting a division of property in exchange for the disputed payments other than her right of alimony."

To the extent that the court held that surrender of inchoate rights cannot support a division of property, we disagree. Where the record clearly shows that the parties so intended the payments for this purpose, surrender of a wife's inchoate rights in exchange for a lump sum payment, to be made in installments over a number of years, might well preclude a finding that the payments were made in pursuance of the husband's obligation of support. The intention of the parties is the principal determinant. But here, the record is not clear and, in fact, is silent respecting the surrender of inchoate rights and the payment of a lump sum in exchange therefor. It appears, rather, that the parties contemplated a division of property on the basis of their respective ownership at the time of divorce, plus payments for Jean's support to be made over a period of 10½ years.

Further supportive of this finding is the use of a 10½ year payment period. Had the parties intended these to be installment payments under Section 71 (c)(1), rather than periodic payments under Section 71(a), they could easily have provided that the principal sum of $228,000.00 must be paid within ten years. In addition, we note that the release signed by the parties following issuance of the decree referred to "a property settlement between the parties in lieu of alimony", which Jean had sought in her counterclaim for divorce.

As Jean contends, the fact that the payments were for a fixed sum, were secured and were not contingent upon death or remarriage is indicative of a division of property rather than payment of support. So also is the divorce court's adoption, and inclusion in the divorce decree, of the findings and conclusions submitted by Jean's attorney. We find, however, that these conclusions are more than counterbalanced by those factors indicating that the payments were intended for the purpose of

support rather than as a division of property. As the Tax Court noted, a payment of a fixed and secured sum over a definite period of time may nevertheless be intended to discharge the general obligation of support. It is not uncommon for the parties to provide for such payments, in lieu of alimony, where they wish to insure that the decree of divorce will not be subject to later modification by the Court.

Contrary to Jean's contention, we do not consider the result in this case to be inconsistent with our previous decision in *Van Orman* and *Houston, supra.* In *Van Orman,* the "Property Settlement Agreement" obliged the taxpayer to purchase a home for his former wife. The home was to be selected by her and was to cost not more than $40,000.00. The taxpayer was required to deliver free and clear title to the home to his former wife within ten years.

In early 1962, he paid $7700.00 down on the purchase price of a home and borrowed the remainder of the $37,500.00 purchase price, secured by a mortgage. For the years 1962 and 1963, he attempted to deduct the mortgage and home insurance payments under Section 215(a). The Tax Court's decision upholding the Commissioner's disallowance of these deductions was affirmed by this Court. As Jean argues, we held that Section 71 (a)(1) "contemplates a payment made in pursuance of the husband's obligation of support and not satisfaction of some property rights of the former spouse." While we identified certain factors which are also present in this case as indicating the satisfaction of a property right rather than the payment of periodic support,[4] we also pointed out that title to the home was to be delivered within the ten year limitation period of Section 71(c). More important, unlike the instant case, the Agreement provided for support payments, requiring "alimony of $1300.00 to $900.00 per month for a period of ten years and one month, the specific amount depending on taxpayer's income during that period." 418 F.2d at 171. No such separate provision for the payment of support was included in the Wright divorce decree.

[4] "[T]he payments made by reason of the absolute obligation to purchase the new home would not be affected by such factors as remarriage or change in economic status." 418 F. 2d at 171.

Contrary to Jean's contention, we find *Houston* supportive of the Tax Court's decision. In that case, Houston (husband) was obliged under the settlement agreement to transfer assets worth $505,699.44 to Schwab (wife). He was to convey non-cash assets worth $90,699.14 and $415,000.00 in cash, the latter to be paid through the immediate transfer of $115,000.00 and the annual payment of $25,000.00 per year for the next twelve years.

In 1959, Houston deducted $50,569.94 as "ten percent of the total of thirteen periodic payments payable over a period of thirteen years to former spouse . . .". The Commissioner disallowed the deduction and the Tax Court upheld the Commissioner's ruling. We affirmed, holding that the $90,699.14 in non-cash assets and the $115,000.00 in cash represented a division of property. We reasoned that "[w]here there is a substantial payment, such as this, which comes soon after the entry of the divorce decree, we think it is not unreasonable to conclude that a property settlement was intended." 442 F.2d at 42.

In the instant case however the question at issue concerns whether the annual payments—not a lump sum transferred immediately after the divorce—were intended as support or as a division of assets. These payments are more closely akin to the $25,000.00 annual payment in *Houston,* which this Court impliedly considered deductible by Houston and income to Schwab. Our opinion states: "[w]e think that the Tax Court correctly noted that the 1959 payment *was distinguished from the later* [$25,000.00] *amounts* both by its size and time of payment." 442 F.2d at 42. It is clear that both the Tax Court and this Court considered the fixed annual payments to have been intended as support.

Jean also challenges the Tax Court's finding that the payments were "periodic payments" within the meaning of Section 71(a) and Section 71(c). She contends that the decree of divorce, entered October 4, 1967, did not become final under Wisconsin law until October 4, 1968. Since the last payment will be due April 4, 1978, she argues that full payment of the principal sum will be paid over a period ending less than ten years from the

date of the decree, and that, therefore, the payments received constitute "installment payments" under Section 71 (c)(1), rather than "periodic payments" under Section 71(a).

Under Wisconsin law, the parties to a divorce may not remarry for a period of one year subsequent to issuance of the decree. On this basis, Jean characterizes the decree as "interlocutory" until one year following its issuance, at which point it becomes "final". During the period of one year following the issuance of the decree, either party may appeal, and the court may vacate or modify the judgment as it affects the marital status of the parties.

For the purposes of Section 71, we find that the decree is final at the time of its issuance. The fact that either party may appeal is indicative of its finality, as is the fact that the court may vacate the judgment within that one year period and "restore the parties to the marital relation that existed before the granting of such judgment." Wis. Stats. of 1967, Sec. 247.37(2). Moreover, obligations imposed upon the parties under the decree become effective at the time it is granted.

For the foregoing reasons, we hold that the Tax Court correctly construed the payments as "periodic payments received . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree . . .". Accordingly, they constitute gross income to Jean and are deductible under Section 215(a) by William.

We further agree with the Tax Court's finding that the premiums paid by William on the term life insurance policy should not be included in Jean's gross income and therefore are not deductible by William. That the premium payments satisfy the requirements of Section 71(a) is undisputed in all but one respect[5]: whether the payments were constructively received by Jean, i.e.

[5] As the Tax Court noted, the "parties do not contend that these premium payments are not payments made in discharge of a legal obligation which because of the material relationship is incurred by William. The premium payments are imposed under a decree. . . . The payments are periodic

(Footnote continued on following page)

whether she received in any of the years under consideration an ascertainable economic benefit through the payment by William of premiums.

The divorce decree requires William to purchase term insurance which, unlike whole insurance, entitles the owner-beneficiary, Jean, to no ascertainable benefits other than the proceeds of the policy upon William's death. Furthermore, her entitlement to the proceeds is defeasible by her remarriage, death or attainment of age 65 prior to William's death.

We find that the benefits derived by Jean through the payment of premiums by William are no greater than the benefits received by the wife in *Seligmann v. Commissioner*, 207 F.2d 489 (7th Cir. 1953). Under *Seligmann*, and for the reasons set forth in the opinion of the Tax Court herein, 62 T. C. 377, 395-400, we find that the premiums paid by William on the term life insurance policy are not includable in the gross income of Jean and are not deductible by William.

For the foregoing reasons, the decision of the Tax Court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] *Continued*
as William is obliged to pay them over the lesser of his or Jean's life, an indefinite period, or 1987. The parties recognize Jean did not actually receive the premiums paid and the dispute centers on whether the premium payments were constructively received by Jean within the meaning of Section 71(a)." 62 T. C. at 396.

USCA 4216—Midwest Law Printing Co., Inc., Chicago—10-28-76—275

WILLIAM C. WRIGHT AND ELLEN W. WRIGHT, ET AL.,[1] PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 830–72, 1356–72, 1991–72, 4104–72. Filed June 25, 1974.

In an oral agreement stipulated to at their divorce trial petitioner William C. Wright and his former wife, petitioner Jean W. Wright, agreed that all property owned by Jean would be granted to her and in addition she would be granted certain property of William's, that William would pay certain of her expenses, and that William would pay to Jean $228,000 over a period of 10½ years, the payment to be secured by stocks placed in escrow, and that William would pay the premiums on a $200,000 term life insurance policy owned by Jean on his life and keep Jean as the beneficiary until she died or remarried or reached age 65. The judgment rendered on Oct. 4, 1967, adopted the stipulation of the parties and granted a divorce to Jean which prohibited either party from remarrying until 1 year thereafter. The stipulation was transcribed by the court reporter as was the judgment of the court. A written decree was entered by the court on Feb. 2, 1968, incorporating the stipulation of the parties. *Held:*

1. The $228,000 to be paid by William to Jean was a payment because of the marital relationship and in discharge of his duty of support to her and not a division of property of the parties. It was a periodic payment under sec. 71(c)(2) since the judgment entered on Oct. 4, 1967, approving William's agreement with Jean which was reduced to writing and reconfirmed in the written decree entered Feb. 2, 1968, required him to make these payments over a period of over 10 years from Oct. 4, 1967. Therefore, the payments made in 1968, 1969, and 1970 as installments on the $228,000 are includable in Jean's income and deductible by William.

2. The premiums paid by William on the term insurance policy did not bestow such a benefit on Jean as to result in her constructive receipt of income therefrom. Therefore, the amount of the premiums paid by William in 1968, 1969, and 1970 are not includable in Jean's income or deductible by William.

Gerald J. Kahn and *John M. Byers*, for the petitioners in docket Nos. 830–72 and 4104–72.

Bruce C. O'Neill, for the petitioner in docket Nos. 1356–72 and 1991–72.

Michael W. Ford, for the respondent.

OPINION

SCOTT, *Judge:* Respondent determined deficiencies in the Federal income tax of petitioners William C. and Ellen W. Wright in the amounts of $8,603.13, $14,963.76, and $14,367.14 for the calendar years 1968, 1969, and 1970, respectively. Respondent determined deficiencies in the Federal income tax of petitioner Jean W. Wright in the amounts of $6,667.59, $7,330.41, and $7,093.34 for the calendar years 1968, 1969, and 1970, respectively.[2]

The parties have disposed of some of the issues by agreement, leaving for decision the following:

(1) Whether the cash payments made by William C. Wright during the calendar years 1968, 1969, and 1970 to his former wife, Jean W. Wright, are includable in her gross income for such years as alimony under the provisions of section 71, I.R.C. 1954,[3] and consequently deductible for such years by William C. and Ellen W. Wright under the provisions of section 215; and

(2) Whether annual premiums paid by William C. Wright during the calendar years 1968, 1969, and 1970 on a term life insurance policy

[1] Cases of the following petitioners are consolidated herewith: Jean W. Wright, docket No. 1356–72; Jean W. Wright, docket No. 1991–72; and William C. Wright and Ellen W. Wright, docket No. 4104–72.

[2] Respondent has taken an inconsistent position with respect to his deficiency determinations against petitioners William C. and Ellen W. Wright and petitioner Jean W. Wright.

[3] All references are to the Internal Revenue Code of 1954.

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owned by his former wife, Jean W. Wright, are includable in her gross income for such years as alimony under the provisions of section 71 and consequently deductible for such years by William C. and Ellen W. Wright under the provisions of section 215.

All the facts have been stipulated and are found accordingly.

Petitioners William C. Wright (William) and Ellen W. Wright, husband and wife, were residents of Milwaukee, Wis., at the time of the filing of their petitions in this case. They filed their joint Federal income tax returns for the calendar years 1968, 1969, and 1970 at the Internal Revenue Service Center, Kansas City, Mo.

Petitioner Jean W. Wright (Jean) was a resident of Cedarburg, Wis., at the time of the filing of her petitions in this case. She filed her Federal income tax returns for the calendar years 1968, 1969, and 1970 at the Internal Revenue Service Center, Kansas City, Mo.

Jean and William filed a joint Federal income tax return for the calendar year 1967.

Jean was born on January 22, 1922, and William was born on February 10, 1921. On January 31, 1948, Jean and William were married in Milwaukee, Wis. Two children were born of their marriage, one on July 22, 1950, and the other on March 25, 1952.

On April 28, 1967, William commenced an action in the Circuit Court for Milwaukee County seeking an absolute divorce from Jean and the custody of their minor children. On August 17, 1967, Jean filed an answer seeking dismissal of William's complaint and asking for support and maintenance of herself and the minor children. On October 4, 1967, Jean filed a counterclaim asking for an absolute divorce from William, alimony and support money, a division of property, attorneys' fees, costs, and custody of the minor children.

On October 4, 1967, the action for divorce came to trial before Judge L. J. Foley, Jr., of the Circuit Court for Milwaukee County, Wis. At that time, William's attorney informed the court that no evidence would be introduced in support of the complaint and that the parties would proceed on Jean's counterclaim.

At the trial William and Jean, relying on a statement of assets and liabilities prepared by William of the property they owned, entered into a stipulation in open court with regard to disposition of property owned by each of them, custody of the minor children, alimony, attorneys' fees, and court costs. The stipulation was taken by stenographic notes by the court reporter and later transcribed, the transcript being certified as true and correct by the reporter under date of October 13, 1967. The stipulation of the parties, with some amplification as to Jean's rights of visitation to the children, was accepted and adopted by the court in its findings of fact, conclusions

of law, and judgment orally made by the judge at the hearing and included in the transcript of the hearing. This oral statement included the conclusion of law by the court that based on her counterclaim Jean "is entitled to an absolute divorce." It was stipulated that William and Jean had a net worth in the amount of $1,065,122 which consisted of the following:

ESTATE OF WILLIAM C. AND JEAN WRIGHT

Assets

Farm and improvements			$121,500
Farm furnishings			20,000
Total			141,500
Encumbrances:			
Mortgage—Hillmann	$8,500		
Mortgage—P. Jennings	5,500		
Mortgage—Lueders	3,266	17,266	
Net asset value			$124,234
Residence and rear parcel (per appraisal 6/16/67)		135,000	
Contents, furnishings, and jewelry (per appraisal 1959)		80,000	
Total			215,000
Investments (per report 5/1/67):			
William C. Wright portfolio		616,470	
Jean W. Wright		139,518	
Total investments			755,988
Automobiles—antique and other			24,900
Livestock and animals			48,000
Notes receivable			1,000
Total assets			1,169,122

Liabilities

First Wisconsin National Bank (Jean Wright maker; cosigned by William Wright)	24,000
First Wisconsin National Bank (William Wright maker)	20,000
Fall River Foundry—due from William Wright, officer	60,000
Total liabilities	104,000

Such assets were owned by William and Jean as follows:

Jean

Farm and improvements		$121,500
Contents, furnishings, and jewelry		8,000
Investments—Jean Wright		139,518
		269,018
Less: Mortgages	$17,266	
Note	24,000	41,266
Net assets		227,752

	William	
Farm furnishings		$20,000
Residence and rear parcel		135,000
Contents, jewelry, and furnishings		72,000
Investments		616,470
Automobiles		24,900
Livestock and animals		45,000
Notes receivable		1,000
		917,370
Less: Notes payable	$20,000	
	60,000	80,000
Net assets		$37,370

The aforementioned assets owned by Jean were either personal property inherited from her mother or purchased with portions of $120,000 inherited from her mother.

The aforementioned assets owned by William were purchased by him.

At the hearing on October 4, 1967, William and Jean were each represented by counsel. No reference was made at the hearing to William's income or to Jean's need for support. Jean answered affirmatively under oath when asked by her attorney whether she understood that alimony was to be denied. William, having heard the provisions of his stipulation with Jean as stated by Jean's attorney, was asked by his attorney whether that stipulation was in fact the agreement he had entered into with Jean should the court see fit to grant a divorce and answered that it was. William was asked by his attorney whether he understood that there was to be a full and complete division of estate in lieu of any claim upon him by Jean for alimony and answered "Yes."

Following the hearing, Jean's attorney submitted proposed findings of fact and conclusions of law. The conclusions of law provided in part as follows:

> Twenty-first. That alimony be and hereby is denied.
>
> * * * * * * * *
>
> Twenty-fifth. (a) That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff shall pay to the defendant the sum of $228,000.00 within ten and one-half (10½) years of October 4, 1967, * * *

On December 8, 1967, a hearing was held in the Circuit Court of Milwaukee County with regard to William's objection to the proposed findings of fact and conclusions of law submitted by Jean's attorney, particularly the aforementioned paragraphs numbered 21 and 25 which William contended did not conform with the understanding when the stipulation was made a part of the record at the trial on October 4, 1967. At the hearing on December 8, William's attorney submitted to the court proposed paragraphs for the conclusions of law which stated in part as follows:

> 25a That alimony be and hereby is denied and in lieu of said alimony and in full satisfaction of any claim therefore, and as a complete division of estate and to complete the division of property of the parties, the plaintiff shall pay to the defendant the sum of $228,000.00 in 10½ years of entry of judgment said sum to be paid at the rate of $2,000.00 each month for a period of six months and $1,800.00 each month thereafter for a period of 10 years.

At this hearing Jean's attorney stated that the installment payments of the lump sum of $228,000 were not considered as alimony and that it was in truth and in fact a division of the estate. William's attorney stated the reason that a 10½-year period of time for payment of the sum of $228,000 was provided for in the stipulation was to permit William an income tax deduction for the payments and that the property division was entered into with the express understanding of the parties that it was in lieu of alimony. Jean's attorney stated that he considered at the time the 10½-year period was agreed to that Jean need not treat the payment as alimony and that she would not report it as alimony.

The court took the matter under advisement, stating there are substantial financial problems involved in the wording and the court must word the findings in accordance with the judgment that was made or the findings of fact and conclusions of law that were made at the time of the trial.

On January 29, 1968, the findings of fact and conclusions of law submitted by Jean's counsel with certain modifications to paragraphs other than paragraph 25a were adopted by the Circuit Court.

The written formal judgment of divorce was entered by the Clerk of the Circuit Court for Milwaukee County, Wis., on February 2, 1968. It provided in part:

> IT IS ADJUDGED:
>
> First. That the bonds of matrimony heretofore subsisting between the plaintiff, William C. Wright, and the defendant, Jean Wright, be and the same are hereby dissolved and they are forever freed from the obligations thereof, provided, that the judgment so far as it affects the marital status of the parties shall not be effective until the expiration of one year from the date of the granting of said judgment, except that it shall immediately bar them from cohabiting together and it may be reviewed on appeal during such period. But in case either party dies within said period, such judgment, unless vacated or reversed, shall be deemed to have entirely severed the marriage relation immediately before such death.
>
> Second. That neither of the parties to this action shall marry again until one year after the granting of said judgment on the 4th day of October, 1967, and the marriage of either of the parties to this action solemnized before the expira-

tion of one year from the date of the granting of this judgment shall be null and void.

The judgment of divorce awarded Jean (1) the farm and improvements, owned by Jean; (2) the farm furnishings of $20,000, except as otherwise provided; (3) the personal property located at the residence which was owned or inherited by Jean or selected by her; (4) all other personal property in Jean's possession, except as otherwise provided; (5) her investment portfolio; (6) a 1964 Pontiac stationwagon; (7) a 1919 electric automobile; and (8) a horse, a dog, goats, and cats.

The judgment of divorce awarded William (1) the residence; (2) the residence furnishings, except as otherwise provided; (3) all personal property in William's possession, except as otherwise provided; (4) his investment portfolio; (5) all automobiles except for the 1964 Pontiac and the 1919 electric automobile; (6) the livestock on the farm; (7) the chain link fence at the farm; (8) the personal effects of William at the farm; and (9) a note receivable in the amount of $1,000.

The judgment of divorce obligated William (1) to satisfy or assume the existing mortgage encumbering the farm in the amount of $17,266; (2) to pay all farm expenses until all the livestock awarded to him were removed; (3) to pay Jean $250 per month commencing November 1, 1967, for rental of the part of the farm used by him until the animals were removed; (4) to assume and pay the note made by Jean and cosigned by William in the amount of $24,000; (5) to pay until her remarriage all Jean's medical and related expenses in excess of $250 per year; (6) to replace the 1964 Pontiac automobile in or by 1970 and again in or by 1975 with a new substantially equivalent automobile; (7) to pay until Jean's death or remarriage her investment management fees of "Fiduciary Counsel, Inc." in excess of $100 per year; (8) to pay Jean's attorneys' fees in the amount of $7,500; (9) to satisfy the note made by William in the amount of $20,000; and (10) to satisfy the note made by William as an officer of his company in the amount of $60,000.

Jean was obligated under the judgment of divorce to sell 600 shares of stock that she owned in William's company to him at its present book value which was $9,022.

Custody of the children was awarded to William. Further, the guardian ad litem's fee of $1,150 was shared equally between William and Jean.

The judgment of divorce further provided as follows:

Twenty-second. That alimony be and hereby is denied.

Twent-third. That the plaintiff, William C. Wright, shall maintain the present $200,000.00 of life insurance, being with the Northwestern Mutual Life Insurance Company, Policy No. 5 553 595, date of issuance, August 22, 1963 [sic], of which the defandant is owner in full force and effect and shall maintain the defendant

as beneficiary thereon for as long as said policy shall provide and at least to age 65 and shall keep the defendant as beneficiary of all the proceeds of said policy until she dies or remarries; that if there are any proceeds of this insurance that the defendant collects, whatever is not used by the defendant in her lifetime shall be left at the time of her death to the children of the parties, either by her will or by trust or by separate trusts in her will.

* * * * * * *

Twenty-sixth. (a) That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff be and he hereby shall pay to the defendant the sum of $228,000.00 within ten and one-half (10½) years of October 4, 1967; and payable on the following terms: No less than $2,000.00 per month be paid by the plaintiff to the defendant for the first six months; that thereafter the plaintiff shall pay to the defendant no less than the sum of $1,800.00 per month for the balance of the term of the payment of the $228,000.00 specified herein.

(b) Further, that the payment of the sum of $228,000.00 shall be secured by sufficient marketable securities in the investment portfolio awarded to the plaintiff, William C. Wright, which stock shall be placed in escrow with the First Wisconsin Trust Company under suitable terms and conditions to secure the payment of the money awarded to the defendant herein, including, but not limited to the following terms: that the stocks which are placed in such escrow may be replaced by other stocks of equal or greater value or such stocks may be removed as may not be necessary to guarantee the payment of the balance due upon the payment of $228,000.00 and only such amount of stock need be maintained in escrow as may be reasonably necessary to guarantee the payment of the balance due and owing at the given time.

(c) Further, that in case of the death of the plaintiff, William C. Wright, prior to the payment in full of the $228,000.00 the amount owing upon the balance due the defendant shall be paid to the defendant promptly; however, the choice of whether such amount shall be paid from the estate of the defendant, William C. Wright, or from this escrow account shall be at the choice of the duly appointed representative of the plaintiff. However, if the estate is not liquid or is insolvent, or impaired in any manner, then the escrow account or the guarantee of the escrow account is not waived by this provision and the provision is meant to give the choice of only where the amount is to be paid from if there is a choice.

The value of the assets awarded to each Jean and William by the divorce decree exclusive of the 600 shares of Fall River Foundry sold by Jean to William was as follows:

	Jean
Farm and improvements	$121,500
Farm furnishings	20,000
Contents, jewelry, and furnishings	8,000
Investment portfolio	139,518
Pontiac car	Unknown
Antique electric car	Unknown
Horse, cats, and goats	Unknown
Miscellaneous property	Unknown
Approximate value at a discount rate of 6 percent of $228,000 lump-sum payment receivable from William	170,000
	459,018

	William	
Residence and rear parcel		$135,000
Contents, furnishings, and jewelry		72,000
Investment portfolio		616,470
Automobiles		24,900
Livestock and animals		48,000
Notes receivable		1,000
Miscellaneous property		Unknown
		897,370
Less: Previous existing personal liabilities	$20,000	
	60,000	
	80,000	
Liabilities assumed	41,206	
	121,206	
Approximate value of $228,000 lump-sum payment payable to Jean	170,000	291,206
		606,164

The October term of the Circuit Court of Milwaukee County during which October 4, 1967, fell expired on December 31, 1967. No appeal was taken by either party from the judgment of divorce of the Milwaukee County Circuit Court nor were any proceedings to modify or vacate the judgment instituted by either party.

In May 1968 Jean and William each executed a mutual release which stated in part:

> WHEREAS, said judgment of divorce which was entered February 2, 1968 provided for, among other things, a property settlement between the parties in lieu of alimony; • • •

During the calendar years 1968, 1969, and 1970, William paid Jean as installments on the principal sum of $228,000 the amounts of $22,200, $21,600, and $21,600, respectively.

On May 21, 1963, Jean applied to Northwestern Mutual Life Insurance Co. for a 10-year renewable term life insurance policy on the life of William in the face amount of $200,000. Policy No. 5 531 595 was issued by Northwestern Mutual Life Insurance Co. on August 10, 1963, in the face amount of $200,000 on the life of William, which policy is and has since its issuance been owned by Jean. Jean, as sole owner of the policy, is obligated to pay the premiums due on the policy on an annual basis and under the policy provisions may change the beneficiaries. Jean is presently the sole beneficiary under the policy. The policy provided it could be converted at any time until August 10, 1973, to a new level annual premium life or endowment plan in the same underwriting classification and for the same amount of insurance as the existing policy. The original policy was

lost or destroyed and a replacement policy was issued on June 8, 1973.

During the calendar years 1968, 1969, and 1970, William paid Northwestern Mutual Life Insurance Co. as net premiums on the aforementioned policy the sums of $1,505.50, $1,459.50, and $1,415.50, respectively. The gross premium in each of the years 1968, 1969, and 1970 amounted to $2,229.50 and the dividends applied in reduction of the gross premium in 1968, 1969, and 1970 amounted to $749, $840, and $884, respectively.

The 1-year term premiums in the years 1968, 1969, and 1970 for $200,000 of term insurance on the life of a male born on February 10, 1921 (the date of birth of William), based on "P.S. No. 58" rates are $1,464, $1,578 and $1,706, respectively.

William, on his joint Federal income tax returns for the calendar years 1968, 1969, and 1970, claimed deductions under section 215 for alimony payments of $22,775, $24,339, and $28,113, respectively.

Jean, on her Federal income tax returns for the calendar years 1968, 1969, and 1970, did not include in her gross income any payments made to her on her behalf by William, but did include in 1970 the $4,500 representing the value of an automobile purchased for her by William.

Respondent in his notice of deficiency to William dated November 26, 1971, increased his income as reported for the calendar year 1968 by $22,200, representing the claimed alimony deduction for installment payments on the sum of $228,000 during such year. In his petition, William alleges that respondent erroneously failed to allow a deduction as alimony for the payment of $1,505.50 made by William on a life insurance policy owned by Jean.

Respondent in his notice of deficiency to William increased his income as reported by disallowing his claimed deduction for alimony of $24,339 for 1969 and $23,250 of his claimed deduction for alimony for 1970, of which $21,600 for each year represents installment payments on the $228,000 principal sum and $1,460 for 1969 and $1,415.50 for 1970 represent premium payments on a term life insurance policy owned by Jean.

Respondent explained the disallowance of the disputed deductions for alimony paid to Jean in the years 1968, 1969, and 1970 with the statement that:

> It has not been established that such amounts are includible as income to your former wife under section 71 of the Internal Revenue Code. Accordingly, you are not entitled to the deductions under section 215 of the Internal Revenue Code.

Respondent in his notice of deficiency to Jean increased her income for 1968 as reported by the amount of $22,200, representing installment payments received by her from William on the sum of $228,000, and $1,505.50, representing life insurance premiums paid on behalf of Jean by William.

Respondent in his notice to Jean increased her income as reported for 1969 and 1970 by $23,060 and $22,776, respectively, representing $21,600 of installment payments received by Jean from William for each year and $1,460 of life insurance premiums paid on behalf of Jean by William for 1969 and $1,176[4] of life insurance premiums paid on behalf of Jean by William for 1970.

Respondent explained that the increases in her taxable income for the calendar years 1968, 1969, and 1970 do "not qualify as excludable installment payments since the payments are to be paid to you over a period ending more than 10 years from the date of the decree," and that the amounts of $1,505.50, $1,460, and $1,176 for such years, respectively, "represent alimony income."

Section 71(a)[5] provides that if a wife is divorced or legally separated from her husband she must include in her taxable income periodic payments received by her in discharge of a legal obligation arising out of the marital relationship and "imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separatiton." Pursuant to the provisions of section 215(a)[6] a husband is entitled to deduct from his taxable income such periodic payments made to his divorced wife in the year paid.

Jean's primary position is that the installment payments received by her under the divorce decree rendered on October 4, 1967, represented payments of a property settlement and were not payments in discharge of an obligation incurred by her former husband because of the marital or family relationship and therefore these payments are not includable in her income under section 71(a)(1). In the alternative Jean contends that these payments are not includable in her income under section 71(a)(1) since they are excluded by the provision of section 71(c)[7] as the installment payments discharging an obligation the principal sum of which is specified in money are not payable over a period of more than 10 years from the date of the final divorce decree on October 4, 1968. Jean also contends the payments of life insurance premiums by her former husband on a term life insurance policy owned by her do not constitute a sufficient economic benefit to her to qualify the payments as taxable income to her.

William's primary position is that the installment payments he was required to make under the decree rendered on October 4, 1967, and the court-transcribed oral stipulation that he and Jean entered into during the divorce proceedings, which was substantially adopted in such decree, are in discharge of a legal obligation imposed on him because of the marital relationship. Further he contends such payments are periodic under section 71(a)(1) pursuant to section 71(c) as they discharge an obligation the principal sum of which is specified in the decree and stipulation as payable in money over a period extending more than 10 years from the date of the decree when rendered, or from the date 60 days after the expiration of the term of the court during which the decree was pronounced, or from the date the stipulation as transcribed in the divorce proceedings became effective. Therefore he concludes the payments are includable as alimony in his former wife's income and deductible by him. Further William contends that Jean received a valuable economic benefit by virtue of the premiums he paid on the term life insurance policy which Jean owned on his life to the extent of either his actual premium payments or the "P.S. 58" costs, the cost of a 1-year term insurance policy on the life of a male of his age.

As we have noted, respondent took inconsistent positions as to these payments with respect to Jean and William in his notices of deficiencies. Without waiving his inconsistent positions, respondent on brief argues in favor of Jean and against William except with regard to the payments being over a period of more than 10 years from the date of the divorce decree which respondent argues is October 4, 1967.

We have recognized on a number of occasions that where there is a

[4] The actual net premium payment paid by William in 1970 was in the amount of $1,415.50.

[5] SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.
(a) GENERAL RULE.—
(1) DECREE OF DIVORCE OR SEPARATE MAINTENANCE.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

[6] SEC. 215. ALIMONY, ETC., PAYMENTS.
(a) GENERAL RULE.—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

[7] SEC. 71(c). PRINCIPAL SUM PAID IN INSTALLMENTS.—
(1) GENERAL RULE.—For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.
(2) WHERE PERIOD FOR PAYMENT IS MORE THAN 10 YEARS.—If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

division of property of the parties to a divorce and the husband makes payments in satisfaction of property rights of the wife the amounts received by the wife are capital in nature and are neither includable in her gross income under section 71 nor deductible by the husband under section 215. *Lewis B. Jackson, Jr.*, 54 T.C. 125, 129 (1970). See sec. 1.71-1(c)(4), Income Tax Regs. We must therefore first determine whether William's legal obligation was incurred to compensate Jean for her alleged substantial property rights or "because of their marital or family relationship." Sec. 71(a)(1).

Jean argues that the sum of $228,000 to be paid to her was payment for her inchoate interest in William's property at the time of the divorce under Wis. Stat. Ann. section 247.26 (1957), relying on cases as *McCombs* v. *Commissioner*, 397 F. 2d 4 (C.A. 10, 1968), affirming a Memorandum Opinion of this Court, and *Bernatschke* v. *United States*, 364 F. 2d 400 (Ct. Cl. 1966).

William argues the aforementioned payments were necessarily payment for his legal obligation of support arising from the marital relationship as Jean did not exchange any interests in property for such payments, relying on such cases as *William M. Joslin, Sr.*, 52 T.C. 231 (1969), aff'd. 424 F. 2d 1223 (C.A. 7, 1970); *Porter* v. *Commissioner*, 388 F. 2d 670 (C.A. 6, 1968), affirming per curiam a Memorandum Opinion of this Court; *Blanche Curtis Newbury*, 46 T.C. 690 (1966).

The determination of whether the cash installment payments of the $228,000 lump sum constitute a settlement resulting from Jean's property rights or from Jean's rights arising under the marital relationship, rests upon the surrounding facts and circumstances. *William M. Joslin, Sr., supra; Blanche Curtis Newbury, supra; Ann Hairston Ryker*, 33 T.C. 924, 929 (1960). Labels assigned to payments to a spouse by the parties in their agreement or by the divorce decree are not conclusive. *Wilma Thompson*, 50 T.C. 522 (1968); *Elizabeth H. Bardwell*, 38 T.C. 84, 89, 90 (1962), aff'd. 318 F. 2d 786 (C.A. 10, 1963). As we pointed out in *Wilma Thompson*, at page 525, the text of section 71 does not use the word "alimony" and the regulations amplify the statute by explaining that section 71(a) applies only to payments made because of the marital relationship and in recognition of the general obligation to support. Sec. 1.71-1(b)(4), Income Tax Regs. Nevertheless, many cases refer to these obligations arising because of the marital relationship as "alimony." While the fact that the payment would not terminate upon the death or remarriage of the wife is part of the evidence to be considered, this fact is not conclusive that such payments are being made pursuant to a settlement of the respective property rights of the spouses. The intent of the parties is a necessary factor in determining the nature of the payment. *Phinney* v. *Mauk*, 411 F. 2d 1196 (C.A. 5, 1969).

On the basis of the record before us we conclude that the amounts of $22,200, $21,600, and $21,600 which Jean received in 1968, 1969, and 1970, respectively, were in substance and were intended by the parties to be payments in discharge of a legal obligation which was imposed on her former husband, William, because of the marital relationship.

In reaching this conclusion we have found persuasive that Jean, at the time of the divorce, did not own any property in exchange for which she was to receive the sum of $228,000. Jean received all the property she owned at the time of the divorce and additionally the lump sum of $228,000, with a present value of approximately $170,000. Therefore, these payments were not received by Jean in satisfaction of her property rights. *Porter* v. *Commissioner*, 388 F. 2d 670 (C.A. 6, 1968), affirming per curiam a Memorandum Opinion of this Court; *Taylor* v. *Campbell*, 335 F. 2d 841 (C.A. 5, 1964); *Marion R. Hesse*, 60 T.C. 685 (1973); *William M. Joslin, Sr., supra; Wilma Thompson, supra; Blanche Curtis Newbury, supra; Elizabeth H. Bardwell, supra;* cf. *Mills* v. *Commissioner*, 442 F. 2d 1149 (C.A. 10, 1971), affirming 54 T.C. 608 (1970); *Walter H. Weiner*, 61 T.C. 155 (1973), on appeal (C.A. 2, Feb. 1, 1974); *Enid P. Mirsky*, 56 T.C. 664 (1971); *Edith M. Gerlach*, 55 T.C. 156 (1970).

While Jean transferred 600 shares of Fall River Foundry stock to William at the agreed price of book value the record in no way indicates that this price did not reflect the value of such shares. In fact, Jean does not contend that she was not adequately compensated for this stock. In her brief Jean recognizes that in addition to receiving all her own property she received property owned by William consisting of furnishings valued at $20,000, a Pontiac automobile, an antique automobile, and the discharge of her liabilities in the amount of $41,266.

Jean's only contention that the $228,000 to be paid in installment payments was a property settlement is that she relinquished her property rights under Wis. Stat. Ann. section 247.26 (1957)[8] for the

[8] Wis. Stat. Ann. sec. 247.26 (1957), provides:

Upon every divorce from the bond of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, the court may further adjudge to the wife such alimony out of the estate of the husband, for her support and maintenance, and such allowance for the support, maintenance and education of the minor children committed to her care and custody as it shall deem just and reasonable, and the court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband, between the parties and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case; but no such final division shall impair the power of the court in respect to revision of allowances for minor children under section 247.25. No such judgment shall divest or transfer title to real estate unless such judgment or a certified copy thereof is recorded in the office of the register of deeds of the county in which such real estate is situated.

disputed payments. However, Jean's inchoate rights in her husband's property under a common law jurisdiction such as Wisconsin have not been recognized as reaching the dignity of such an interest as to support a division of property among coowners. As the Supreme Court stated in *United States* v. *Davis*, 370 U.S. 65, 70, 71 (1962), in dealing with the taxability to the husband of the value over the basis of property transferred by a husband to a wife in a divorce settlement, "the inchoate rights granted a wife in her husband's property * * * do not even remotely reach the dignity of co-ownership" and "the rights of succession and reasonable share [upon dissolution of the marriage] do not differ significantly from the husband's obligations of support and alimony." The Supreme Court further stated that such inchoate rights "partake more of a personal liability of the husband than a property interest of the wife" and while "these marital rights may ultimately result in the ownership of some of the husband's property * * * this happenstance does not equate the transaction with a division of property by co-owners."

In our view these principles must be borne in mind in determining whether payments made by a husband to a wife are payments made because of the marital relationship and in recognition of the husband's obligation to support the wife. Under Wis. Stat. Ann. section 247.26 (1957), the division of property of the husband is a discretionary and not a mandatory duty of the trial court. *Jordan* v. *Jordan*, 44 Wis. 2d 471, 171 N.W. 2d 385 (1969). Cf. *Lewis B. Jackson, Jr., supra.* One of the factors to be considered by the divorce court in determining whether to grant property of the husband to the wife and the amount of the husband's property to be granted to the wife is whether the wife receives alimony. *Lacey* v. *Lacey*, 45 Wis. 2d 378, 173 N.W. 2d 142 (1970); *Radandt* v. *Radandt*, 30 Wis. 2d 108, 140 N.W. 2d 203 (1966). This record is clear that Jean did not surrender any property interests or give up anything that is recognized as supporting a division of property in exchange for the disputed payments other than her right to alimony.

Although in *Bernatschke* v. *United States*, *supra*, on which Jean relies, the Court of Claims held that annuity contracts purchased by the husband for the benefit of his wife were not based on the marital obligation to support but were intended to be in the nature of a division of property in settlement of the wife's inchoate dower rights, the facts of that case are distinguishable from the instant case. In *Bernatschke* the evidence showed that the parties never discussed the payment of alimony to the wife, that the wife did not request alimony payments, and the husband did not mention such payments. In fact, the husband discussed only the dower rights of the wife. The record before us here contains no showing that the inchoate rights of Jean in

William's property were ever discussed by either party or were the subject of negotiations preceding the oral stipulation or of the oral stipulation itself, or of the award by the divorce court. In fact the record demonstrates that alimony was the subject considered by the parties both before and during the divorce proceedings. In their mutual release signed shortly after the entry of the divorce decree, the parties referred to a property settlement "in lieu of alimony." This is further indication that Jean considered she was giving up her right to support sought in her counterclaim in return for the installment payments over a 10½-year period. Section 247.26 of the Wisconsin Statutes confers upon a divorce court the authority to adjudge to the wife such alimony out of the estate of the husband for her support as it deems just and reasonable and to divide the estate of the husband between the parties having regard to the legal and equitable rights of each party. This statute contemplates that both alimony payments and division of the estate of the husband are means of discharging the obligation of the husband upon termination of the marital relationship to continue to support his wife in the manner to which she has become accustomed. *Wisconsin Department of Taxation* v. *Siegman*, 24 Wis. 2d 92, 128 N.W. 2d 638 (1964); *Tonjes* v. *Tonjes*, 24 Wis. 2d 120, 128 N.W. 2d 446 (1964). See *Lacey* v. *Lacey*, *supra*; *Radandt* v. *Radandt*, *supra*.

This record suggests that Jean preferred and William was agreeable to a division of property rather than payment of alimony since under Wisconsin law the State court would be foreclosed from thereafter modifying its judgment. *Gray* v. *Gray*, 240 Wis. 283, 3 N.W. 2d 376 (1942).

Having determined the disputed payments are alimony in satisfaction of William's obligation to support and not a division of property, we must determine whether or not the disputed payments are periodic payments in discharge of a legal obligation which is imposed under a decree of divorce or separate maintenance or under a written instrument incident to such decree within the meaning of section 71 (a)(1). As the parties do not contend the payments are subject to any contingency, the payment of a principal sum by installments will qualify as a periodic payment only if the sum is payable over a period of more than 10 years from the date of the decree or of the written instrument incident to the divorce or separation. Sec. 71(c)(2). The last installment payment was due and payable under the terms of the decree as orally rendered, the written decree, the final decree and the stipulation, 10½ years from October 4, 1967, that being April 4, 1978. Consequently the obligation to pay pursuant to the decree or written instrument must commence prior to April 4, 1968, for the payments

to be considered periodic within section 71(a)(1). Cf. *William M. Joslin, Sr., supra.* The date when the obligation in this case came into existence depends on whether the obligation was incurred when the divorce decree was rendered on October 4, 1967; when the written decree was entered on February 2, 1968; when the divorce decree became final on October 4, 1968; when 60 days had expired after the term of the divorce court during which the degree was rendered, that being February 29, 1968; or when the stipulation was reduced to writing by the court reporter. In determining the source of the obligatory payments we must look to the applicable State law. *Gordon L. Munderloh*, 48 T.C. 432 (1967).

Jean contends the obligation was incurred under the divorce decree which became final on October 4, 1968, relying on *Riddell* v. *Guggenheim*, 281 F. 2d 836 (C.A. 9, 1960); *Commissioner* v. *Ostler*, 237 F. 2d 501 (C.A. 9, 1956), affirming a Memorandum Opinion of this Court; *Commissioner* v. *Evans*, 211 F. 2d 378 (C.A. 10, 1954), affirming 19 T.C. 1102 (1953); *Merle Johnson*, 50 T.C. 723 (1968); *Marriner S. Eccles*, 19 T.C. 1049 (1953), affirmed per curiam 208 F. 2d 796 (C.A. 4, 1953). *Merle Johnson* deals with the right of a husband to use "head of household" tax rates after the entry of an interlocutory decree of divorce. *Marriner S. Eccles* and *Commissioner* v. *Ostler* both deal with the right of a husband and wife to file a joint return after the entry of an interlocutory decree of divorce. The statutory provisions relevant to those cases are so different from the provisions of section 71 as to cause those cases not to be helpful in disposing of the issue here present. *Riddell* v. *Guggenheim* and *Commissioner* v. *Evans* deal with divorce decrees entered prior to the effective date of section 71(a)(3)[9] which was a new provision in the 1954 Code. See discussion of the effective date of this subsection in *John W. Furrow, Jr.*, 34 T.C. 931, 935 (1960), affd. 292 F. 2d 604 (C.A. 10, 1961). In our view the difference in the statutes applicable to the *Guggenheim* and *Evans* cases and those applicable in the instant case causes those cases to be inapposite to the instant case.[10]

[9] SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.
(a) GENERAL RULE.—
* * * * * * *
(3) DECREE FOR SUPPORT.—If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

[10] Petitioner also relies on *Gordon M. Eno*, T.C. Memo. 1965-210. While the *Eno* case involved years governed by the provisions of sec. 71(a)(2) and (3) as contained in the 1954 Code, the facts there do not remotely resemble those in the instant case. In *Eno* the trial court entered a decree for a principal sum to be paid over a period of less than 10 years. The wife appealed, requesting an increase in the principal sum. The appellate court
(Continued)

William contends the obligation to make the installment payments to Jean was imposed by the divorce decree when rendered on October 4, 1967, such decree becoming effective when pronounced, relying on *Seiler* v. *Seiler*, 48 Wis. 2d 469, 180 N.W. 2d 627 (1970), and *Brackob* v. *Brackob*, 265 Wis. 513, 61 N.W. 2d 849 (1953). Alternatively William contends that the portion of the judgment concerning the disputed payments became legally binding on him on February 29, 1968, when such portion of the judgment concerning the disputed payments could not be modified or vacated as 60 days had lapsed from the expiration of the term of the court during which the judgment was rendered. William asserts again in the alternative that he and Jean entered in open court into an oral stipulation concerning in part William's payment of the installment obligation which was transcribed by the court reporter and such agreement was enforceable as it was in the nature of a contract under Wisconsin law. Consequently he urges the obligation arose on October 4, 1967, under a written instrument incident to the divorce. Under each of these circumstances William contends the 10-year period began to run from the moment the obligation arose, thereby qualifying the disputed payments as periodic under section 71(c)(2).

We conclude the disputed payments are periodic payments in discharge of a legal obligation imposed by the terms of both the oral judgment and the written decree which permit the principal sum specified in the decree to be paid in money over a period ending more than 10 years from the date of the judgment and the decree within the meaning of section 71(c)(2). William's legal obligation to pay the disputed payments was based on the oral pronouncement of the divorce court on October 4, 1967, which was later formally entered as a written judgment on February 2, 1968. Under the terms of the oral and written judgments the principal sum of $228,000 is payable over 10½ years from October 4, 1967. Since William and Jean were separated after October 4, 1967, and the judgment entered on that date required William to make the payments to Jean, the payments are specified in a decree provided for in section 71(a) and therefore

(Continued)
increased the principal sum but set the amount of the installment payments at a figure which extended the payments beyond 10 years. The trial court modified its decree in accordance with the appellate court's direction and the wife immediately filed a motion for rehearing with the appellate court, pointing out that since the time for payment under its holding extended over 10 years she would be required to include the payments in her gross income and would get a decreased net amount from that initially granted by the trial court and not an increased amount as intended by the appellate court. The appellate court then changed the required amount of installment payments so that the principal sum would be paid in less than 10 years. Under the facts present in the *Eno* case there was never any final order providing for installment payments over a period of more than 10 years. On rehearing, the appellate court merely corrected an inadvertent error in its original decision.

are payable over a period of over 10 years by such a decree and are periodic under section 71(c)(2).[11] See *Florence Korman*, 36 T.C. 654, 656 (1961), affirmed per curiam 298 F. 2d 444 (C.A. 2, 1962).

Jean and William reached an oral understanding that was accepted by the court in its oral judgment which was granted on October 4, 1967, and at that time became legally operative on the parties, excepting insofar as it affected the marriage status of the parties for 1 year thereafter. *Holschbach* v. *Holschbach*, 30 Wis. 2d 366, 141 N.W. 2d 214 (1966); *Brackob* v. *Brackob*, *supra;* Wis. Stat. Ann. sec. 247.37 (1957). The oral judgment was subsequently reduced to writing and entered on February 2, 1968. This written judgment specified in part that William was obligated to pay monthly installments on the principal sum of $228,000 commencing October 4, 1967, for a period which could extend 10½ years therefrom which period was more than 10 years from the date of the oral and written judgments. There has been no appeal of the oral judgment and its related written judgment or portions thereof within the time prescribed by statute of 1 year from the date when such judgment was granted on October 4, 1967. Wis. Stat. Ann. sec. 247.37 (1957). William's obligation to make the payments to Jean arose on October 4, 1967, when his agreement with Jean was confirmed in the judgment of the court rendered on that date. This obligation was reconfirmed in the written judgment entered on February 2, 1968. This obligation to make the installment payments extended over a period of over 10 years. The obligation was first to a wife separated from her husband by the entry of the divorce judgment on October 4, 1967, and to a divorced wife from 1 year thereafter. Under the law as it now stands, whether there is a status of separation or of divorce is immaterial since the statute covers payments in either category.

For the taxable year 1968 Jean is required to include in her gross income the amount of $22,200, and for each of the taxable years 1969 and 1970 the amount of $21,600 as alimony in accordance with section 71(a)(1) and (c)(2). William is entitled to deduct such amounts for each of those years pursuant to section 215(a).

The final issue is whether the premiums paid by William on the term life insurance policy owned by Jean are includable in Jean's income

[11] Sec. 1.71-1(b)(3)(i), Income Tax Regs., provides:

(3) *Decree for support.*—(i) Where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable year, paragraph (3) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after August 16, 1954, from her husband under any type of court order or decree (including an interlocutory decree of divorce or a decree of alimony pendente lite) entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. It is not necessary for the wife to be legally separated or divorced from her husband under a court order or decree; nor is it necessary for the order or decree for support to be for the purpose of enforcing a written separation agreement.

under section 71(a)(1) and deductible under section 215 by William for the taxable years 1968, 1969, and 1970. The parties do not contend that these premium payments are not payments made in discharge of a legal obligation which because of the marital relationship is incurred by William. The premium payments are imposed under a decree for the same reasons as we have previously discussed. The payments are periodic as William was obligated to pay them over the lesser of his or Jean's life, an indefinite period, or 1987. The parties recognize Jean did not actually receive the premiums paid and the dispute centers on whether the premium payments were constructively received by Jean within the meaning of section 71(a). Jean contends the premium payments on the term insurance policy on the life of William made by him on her behalf as owner of the policy do not create taxable income to her as any benefit she might realize under the insurance policy is too contingent to have any present direct economic value, relying on *Seligmann* v. *Commissioner*, 207 F. 2d 489 (C.A. 7, 1953), reversing a Memorandum Opinion of this Court, and *William H. Brodersen, Jr.*, 57 T.C. 412 (1971). Further, Jean argues she did not receive any property of ascertainable value as she could not receive any proceeds under the policy unless, prior to January 22, 1987 (the date Jean becomes 65 years of age), her husband predeceased her and she remained unmarried. William, relying on *Stevens* v. *Commissioner*, 439 F. 2d 69 (C.A. 2, 1971), reversing a Memorandum Opinion of this Court, and *Melvin A. Christiansen*, 60 T.C. 456 (1973), contends that his payment of premiums provided Jean with a valuable economic benefit, measured by the actual premium payments or the "P.S. 58" costs, since Jean was or in the event of her death her estate, if it decided to start making the premium payments, would be the owner of the policy. Further William distinguishes *William H. Brodersen, Jr.*, *supra*, on the ground that the term insurance policy in that case provided security for alimony payments under the settlement agreement as adopted by the divorce court should the husband die before all payments were made.

The intent of Congress in enacting the predecessor of section 71 in 1942 was "to treat such payments as income to the spouse actually receiving or actually entitled to receive them and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income." S. Rept. No. 1631, 77th Cong., 2d Sess. (1942), 1942-2 C.B. 568. Clearly, the legislative intent was that the tax burden should rest on the spouse to whom the benefit accrues.

It is not required that there be an actual receipt of payments by the wife for an amount to be taxable income to her. *Melvin A. Christiansen*, *supra;* *Robert Lehman*, 17 T.C. 652 (1951). However, it is necessary that the payments by the husband confer on the wife a

presently ascertainable economic benefit for the husband to be entitled to a deduction and the wife to include in her income the amount of such payments. *Cosman* v. *United States*, 440 F. 2d 1017 (Ct. Cl. 1971); *Mandel* v. *Commissioner*, 229 F. 2d 382 (C.A. 7, 1956), affirming 23 T.C. 81 (1954); *Seligmann* v. *Commissioner*, *supra*; *Eugene F. Emmons*, 36 T.C. 728 (1961), aff'd. 311 F. 2d 223 (C.A. 6, 1962); *Robert Lehman*, *supra*.

The requisite economic benefit exists where the wife has noncontingent proprietory rights in an insurance policy and its proceeds. This economic benefit can be equated directly with whatever contractual rights, resulting from the premium payments, run in favor of the owner-beneficiary. *Katharine T. Hyde*, 36 T.C. 507 (1961), aff'd. 301 F. 2d 279 (C.A. 2, 1962); *Lemuel Alexander Carmichael*, 14 T.C. 1356 (1950); *Anita Quinby Stewart*, 9 T.C. 195 (1947). Cf. *Piel* v. *Commissioner*, 340 F. 2d. 887 (C.A. 2, 1965), affirming a Memorandum Opinion of this Court; *Weil* v. *Commissioner*, 240 F. 2d 584 (C.A. 2, 1957), affirming on this issue 23 T.C. 630 (1955).

To focus on the ownership and the irrevocable beneficiary of an insurance policy in determining whether the wife receives an economic benefit from premium payments by the husband will not dispose of the issue in the present case. Ownership of an insurance policy secures only those rights which the terms of the policy bestow on the owner. Similarly an irrevocable beneficiary derives his rights from the contractual rights under the policy inuring to his benefit. The insurance company which receives the premium payments from the insured does not act as a conduit for the owner-beneficiary. The premiums secure contractual rights for the benefit of the owner-beneficiary. These premium payments may or may not, depending on the terms of the contract and other circumstances, constitute taxable income to the owner-beneficiary. It is quite possible a wife may be an absolute owner and beneficiary of a policy that provides her with rights which are so limited or otherwise restricted as to have no economic substance for tax purposes. See *Harold Ostrov*, 53 T.C. 361 (1969). Consequently, to determine whether a wife receives an economic benefit which is sufficient to cause the premiums to be taxable to her, it is necessary to examine what obligations are due her under the policy, as well as whether she is the owner or assignee and irrevocable beneficiary of the policy.

We note that in the *Stevens* and *Hyde* cases the policies at issue were ordinary life policies. Under such policies the wife as owner-beneficiary received not only pure insurance protection which would decrease as the cash surrender value increased but also the right to draw down the cash value of the policy, to borrow against it, and to collat-

erally assign it. These benefits in *Stevens* and *Hyde* viewed as a whole were sufficient to constitute an economic benefit which caused the premium payments to be taxable to the wife since the taxable benefit there was measured by the amount of premiums paid.

Under the facts before us Jean was the owner and beneficiary of a term life insurance policy. She was the beneficiary of the policy under the divorce decree and insomuch as she as owner of the policy was the only person who could change the beneficiary under the terms of the policy. Her rights as beneficiary to receive the policy proceeds by virtue of William's premium payments were dependent on not only the insured's death but also this event occurring prior to 1987. We note that the fact that William was not required to pay premiums on the occurrence of Jean's remarriage was within Jean's control and therefore it is doubtful whether this contingency should be considered one which would operate to defeat Jean's rights to the policy proceeds. Under the facts here present it is not certain that Jean will ever receive the policy proceeds and the receipt of these proceeds upon William's death is the only benefit the policy carried. Therefore, under these particular circumstances, we conclude on the authority of *William H. Brodersen, Jr.*, *supra*, that Jean did not constructively receive an economic benefit from the premiums paid during the taxable years 1968, 1969, and 1970. In reliance on *Seligmann* v. *Commissioner*, *supra*, we found in *Brodersen* the difference between ordinary and term life insurance policies to be highly significant. The former conferred on the owner the right to borrow on the policy and to surrender it for its cash value, while the latter conferred only a contingent right to receive the proceeds of the policy at the death of the insured during a specified time period. Such a contingent right we held in *Brodersen* did not assure the owner-wife of an "independent financial advantage" which would add directly to the wife's resources. Pure term insurance merely afforded the wife peace of mind in the knowledge that she may benefit from the policy in the future. Such peace of mind does not constitute a taxable economic gain. See *Seligmann* v. *Commissioner*, *supra* at 494.

In *Brodersen* we considered *Stevens* on which William relies here but we distinguished *Stevens* on its facts as there the policy was a whole life insurance policy whereas in *Brodersen* the policy was a term insurance policy. The facts of the instant case are similarly distinguishable from those in *Stevens*. Furthermore, in *Brodersen* we respectfully declined to follow the dictum in *Stevens* that "to deny constructive receipt of benefit whenever the wife's interest in the proceeds is contingent on her surviving her former spouse is to presume

that an insurance policy's only value to the beneficiary lies in receipt of the face amount upon death of the insured" as contrary to *Seligmann*. We adhere to our statement in *Brodersen* that:

> We maintain our view that the protection afforded a wife through the purchase of a term-life insurance policy on her former husband's life does not qualify as an economic benefit to the wife sufficient to create taxable income. • • •

William's attempt to distinguish *Brodersen* on the grounds that there the term insurance policy was only for security purposes is not persuasive. While we were not unaware in *Brodersen* of the security aspects of the policy, our decision was based on the underlying premise that the wife did not have an indefeasible right to receive the insurance proceeds as her interest was contingent on her surviving her former husband, the insured. In other words, the wife was not certain of receiving any moneys by virtue of the policy although she was the owner and beneficiary under the policy. Therefore we concluded in *Brodersen* that the wife did not have a taxable economic benefit. See *Harold Ostrov*, *supra*. In *Blumenthal* v. *Commissioner*, 183 F. 2d 15 (C.A. 3, 1950), affirming 13 T.C. 28 (1949), and *Florence H. Griffith*, 35 T.C. 882 (1961), the decisions, even though they deal with circumstances in which the wife is not the absolute owner of the policies involved, bolster the rationale of *Brodersen* that the wife's rights as a beneficiary under a term insurance policy, being contingent on her surviving the insured, are insufficient to create taxable income to her. These authorities *supra* hold that a wife does not receive a taxable economic benefit from a husband's payments on an insurance policy which provides the beneficiary-wife collateral security for the payment of the husband's continuing obligation to support as the proceeds would become the wife's only if she outlived her former husband which was an uncertainty and the policy does not of itself presently give the divorced wife more than that which she had, the right to the support payments.

Assuming the conversion feature of the policy permitted the issuance of a whole-life policy, both policies being in the same underwriting classification, it might be argued that Jean was entitled to receive the additional benefits attributable to such a policy. However, we point out that it is unclear whether Jean was aware of the conversion feature since the original policy had been lost or destroyed. More fundamental, however, any additional benefits accruing to Jean on conversion would be at her expense as the new policy could only be issued for the same amount of insurance. Insomuch as such a new policy would require increased premium payments and William would not be obligated to pay any of this increased cost, we do not believe the conversion privilege under these circumstances actually bestowed any additional economic benefit on Jean.

William's reliance on *Melvin A. Christiansen*, *supra*, is misplaced. In *Christiansen* the husband paid an amount which discharged the wife's personal obligation to educate her niece and nephews. In the present case the husband paid premiums due on his wife's term insurance policy. It is the contingent nature of the wife's benefits derived under this policy which distinguish the instant case from *Christiansen* where the wife presently and immediately received the benefit accruing to her from the education of the children which the husband provided on her behalf. See *Robert Lehman*, *supra*. Although, since Jean took the policy out, the premiums may have been her obligation prior to the divorce, by the divorce decree they were made William's obligation and therefore Jean did not constructively receive income by William's payment of her obligation. At the time the payments were made they were William's obligation under the divorce decree and were not Jean's obligation.

Realization of taxable gain must occur in the year during which it is sought to be taxed. In *Helvering* v. *Horst*, 311 U.S. 112, 115 (1940), the Supreme Court stated: "Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." A term life insurance policy, unlike an ordinary life policy which has a cash surrender value and other valuable rights, has no financial value to the owner and no value to the beneficiary except the proceeds upon the death of the insured. Until this last step occurs, the insured's death, the beneficiary has no indefeasible right to the proceeds.

In conclusion, under the facts before us, Jean's rights under the policy were defeasible if she predeceased her husband and in any event by 1967. Consequently we hold she did not possess an absolute vested right to receive the policy proceeds. Under these circumstances we conclude that Jean did not constructively receive an economic benefit under the policy and no amount is includable in her income because of the payments of the premiums on this policy by William.

Decisions will be entered under Rule 155.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

WILLIAM C. WRIGHT,

Plaintiff, Case No.348-178

v. FINDINGS OF FACT
-and-
JEAN WRIGHT, CONCLUSIONS OF LAW

Defendant.

The above entitled action having come on for hearing before the Honorable L. J. FOLEY, JR., Circuit Judge, in and for Milwaukee County, on the 4th day of October, 1967;

And the plaintiff appearing in person and by his attorneys, Shellow, Shellow & Coffey, by Gilda B. Shellow; and the defendant appearing in person and by her attorney, Ray T. McCann by Leonard L. Loeb; and Richard T. Teschner appearing as Guardian ad litem for the minor children of the parties;

That the summons in the above entitled matter having been served upon the defendant on April 28, 1967, as appears from the proof of

service by the sheriff and having been filed herein; and thereafter, the complaint of the plaintiff having been duly served upon the attorney for the defendant on the 18th day of July, 1967, as appears from the admission of service thereon, and having been duly filed; and the answer of the defendant having been duly served upon the attorneys for the plaintiff on the 17th day of August, 1967, and served upon the Family Court Commissioner and filed on said August 17th, 1967; and thereafter a counter-claim on behalf of the defendant, Jean Wright, having been duly served upon the attorneys for the plaintiff and the Family Court Commissioner and duly filed as appears from all the proofs of service upon said document;

And the plaintiff having offered no proof upon the complaint and based upon all the records, files, and proceedings had herein, and the court being duly advised in the premises, as Judge before whom the case was tried, I now make the following:

FINDINGS OF FACT

First. That the plaintiff is an adult residing at 7863 North Club Circle in the Village of Fox Point, Milwaukee County, Wisconsin, and is by occupation a businessman.

Second. That the defendant is an adult residing at 7863 North Club Circle, in the Village of Fox Point, Milwaukee County, Wisconsin, and is by occupation a housewife.

Third. That the parties to this action were married on January 31, 1948 at Milwaukee, Wisconsin, and ever since have been husband and wife.

Fourth. That two (2) children have been born as a result of this marriage, namely Charles Wright, seventeen (17) years of age, born July 22, 1950; and Sally Wright, fifteen (15) years of age, born March 25, 1952; and that there are no adopted children of this marriage.

Fifth. That both the parties to this action have been bona fide residents of the State of Wisconsin for more than two (2) years next

preceding the commencement of this action and bona fide residents of Milwaukee County for more than thirty (30) days next preceding the commencement of this action.

Sixth. That no other action for divorce, legal separation, or annulment of marriage has ever been commenced or is now pending between these parties before this or any other court or judge either in Wisconsin or in any other state; that plaintiff had one prior marriage which terminated in divorce in Marinette, Wisconsin, in the 1940's.

Seventh. That this action was not brought by reason of any fraud or collusion by or between the parties hereto.

Eighth. That the defendant-wife has proved a course of cruel and inhuman treatment by the plaintiff towards her, which has adversely affected her health in that, among other things, the plaintiff has been cruel and inhuman towards the defendant in that he showed her no love and affection, that he asked her to get a divorce, that he falsely

accused her of associations, that he absented himself from the home, that he used vile and indecent language in and towards her, was sullen and morose, and alienated her relationship with the children; that this conduct did adversely affect her physical and mental health to such a degree that she could no longer function as a wife if required to live under these circumstances.

Ninth. That both the plaintiff and the defendant herein are fit and proper persons to have the care, custody, and control of the minor children of said parties.

Tenth. That the plaintiff-husband made a representation as to all the assets of any kind or nature and liabilities in which he or both the parties have any right, title or interest in and the value thereof; and that the defendant has completely relied upon such representations by and on behalf of the plaintiff-husband in reaching the stipulation with respect to property division, custody, alimony, division of estate, attorneys

fees and costs and disbursements of the action; and the court finds that based thereon, all the provisions of the stipulation are reasonable and fair.

Eleventh. That the last known address of the plaintiff is 7863 North Club Circle, in the Village of Fox Point, Milwaukee County, Wisconsin; and that of the defendant is Route 2, Box 414, Cedarburg, Wisconsin, 53012.

and I find as

CONCLUSIONS OF LAW

First. That the defendant is entitled to a judgment wholly dissolving the bonds of matrimony heretofore substituting between the plaintiff and the defendant and forever freeing the plaintiff and defendant from the obligations thereof, providing, however, that said judgment so far as it affects the marital status of the parties shall not be effective until the expiration of one year from the date of the granting of said judgment on October 4, 1967; expecting that it shall immediately bar the parties

from cohabitation together and that it may be reviewed on appeal, if any, during said period. But in case either party dies within said period, such judgment, unless vacated or reversed shall be deemed to have entirely severed the marriage relation immediately before such death.

Second. That neither of the parties to this action shall marry again until one year after the granting of said judgment on the 4th of October, 1967, and the marriage of either of the parties to this action solemnized before the expiration of one year from the date of the granting of this judgment shall be null and void.

Third. Where either plaintiff or defendant is obligated herein or by other judgment or court order to support any minor issue (child or children) of the marriage not in his custody, he or she is prohibited by s. 245.10 from marrying again in this state or elsewhere after such judgment becomes effective (final) unless permission to marry is granted by order of either the court of this state

which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue (child or children) resides, or where the marriage license application is made.

Fourth. That the plaintiff pay to the Clerk of Circuit Court an annual sum of $10, commencing January 1, next, pursuant to s. 59.42 (10)(b), Wis.Stats. Clerk of Circuit Court is ordered to deduct the first $10 received after January 1, next, apply accordingly as a receiving and disbursement fee.

Fifth. That the complaint of the plaintiff be and the same hereby is dismissed upon its merits.

Sixth. That based upon the representations of the plaintiff, William C. Wright, as to the nature and extent and value of the assets and liabilities of the estate of William C. Wright, and Jean Wright, a copy of which representation is attached hereto, the court orders the following.

Seventh. That the farm implements,

furnishings, equipment, and all personalty located thereon, except as otherwise provided herein, shall not be awarded to the defendant and the plaintiff is divested of any right, title, and interest therein.

Eighth. That the farm and improvements in Washington County, the legal description of which property shall be specifically set forth in the judgment, owned by the defendant, Jean Wright, be and the same hereby are awarded to her and the plaintiff is divested of any right, title or interest therein.

Ninth. That with respect to the mortgages upon said farm located in Washington County, the plaintiff shall satisfy or assume and save the defendant harmless from any and all liabilities for the existing mortgages due on said real estate to Mr. Gerhardt Hillman, Mr. Philip Jennings, and Mr. Edward Lueders, Sr. which mortgages, liens, or encumbrances total approximately $17,266.00.

Tenth. That said realty, improvements, and personalty located at said Washington County

farm, not otherwise specifically disposed of herein, shall be the property of the defendant free and clear of any and all encumbrances of any kind or nature and the plaintiff shall execute a Quit Claim Deed to the defendant for said realty.

Eleventh. That the real estate known as 7863 North Club Circle, Fox Point, Wisconsin, shall be awarded to the plaintiff-husband and the defendant is divested of any right, title and interest in the same and shall execute a Quit Claim Deed to the plaintiff for the same and the defendant shall be saved harmless from any and all liability of any kind or nature with respect to said real estate.

Twelfth. (a) With respect to the contents and furnishings and furniture located at the real estate known as 7863 North Club Circle, Fox Point, Wisconsin, the plaintiff shall be awarded the same except insofar as the personal property which belongs to or was inherited by the defendant is located thereat and the additional list of personal property which the defendant shall furnish

to the plaintiff within a reasonable time from the date hereof and the plaintiff will see to it that all said property referred to herein which is to be delivered adequately insured and paid for by the plaintiff to the defendant in good condition w where she shall direct through her counsel within a reasonable time from the demand therefor.

(b) That all personal effects, clothing, jewelry, and items of inheritance, dowry, and gifts that defendant may have selected shall be awarded to her and delivered as set forth in the previous paragraph.

(c) That all the personal property and effects in the possession of each of the parties not otherwise provided for herein, shall be awarded to each of them and the other is divested of all right, title, and interest in the same.

Thirteenth. (a) That the investment portfolio of plaintiff, William C. Wright, with a value as of May 1, 1967, in the amount of $616,470.00 be and the same hereby is awarded to the plaintiff,

William C. Wright, and the defendant is divested of all right, title and interest in the same except as otherwise herein provided.

(b) That the investment portfolio of Jean W. Wright, be and hereby is awarded to the defendant, Jean W. Wright, and the plaintiff is divested of all right, title and interest in the same.

Fourteenth. (a) That the 1964 Pontiac Station Wagon in the possession of the defendant, be and the same is awarded to the defendant and the plaintiff is divested of all right, title, and interest in the same; that the balance of current or recently manufactured automobiles be and the same hereby are awarded to the plaintiff and the defendant is divested of all right, title, and interest in the same and the defendant shall be saved harmless from any and all liability of any kind or nature with respect thereto.

(b) That the antique automobiles other than the 1919 Electric automobile be and the same hereby are awarded to the plaintiff and the defendant

is divested of all right, title, and interest in the same; that the 1919 Electric automobile is awarded to the defendant and the plaintiff is divested of all right, title, and interest in the same.

Fifteenth. (a) That with respect to the livestock and animals at the farm in Washington County which includes such things as Zebras, Wallabies, Addak, Llamas, Pigmy Donkeys, Peacocks, and cattle of that nature, are hereby awarded to the plaintiff-husband and the defendant-wife is divested of all right, title, and interest in the same; that the defendant is awarded her horse named "Gus", goats, cats, and dog named "Dutch".

(b) Further that the plaintiff will have a reasonable time to remove the list of cattle as set forth herein from the farm which is anticipated to be sometime in the Spring of 1968; and the plaintiff-husband may remove the chain-link fencing when the animals are removed in the Spring of 1968, providing it is done at said time at his sole expense and he leaves all the rail fences in good

and usable condition.

(c) That certain personal items such as books presently located in the house at the Washington County farm shall be awarded to the plaintiff and be delivered by the defendant to the plaintiff upon the furnishing of a list of said personal items as agreed upon.

(d) That the plaintiff-husband shall be liable for all farm expenses until all of the animals and cattle awarded to him shall have been removed; said expenses shall include but shall not be limited to heat, light, maintenance expenses, help that is necessary for the plaintiff-husband's farm activities. These expenses shall include all expenses, except those relating to the residence located at said farm. With respect to the residence, the defendant-wife shall be liable for all the expenses in connection with the use and occupancy of said residence including but not limited to light, heat and gas.

(e) That in addition to the foregoing,

the plaintiff shall pay to the defendant the sum of $250.00 per month commencing November 1st, 1967, for the rental of the portion of the farm premises used by him until all the animals are removed from said premises; that the defendant shall be liable for the real estate taxes for the year 1967.

Sixteenth. That a note receivable in the amount of $1,000.00 be and the same hereby is awarded to the plaintiff and the defendant is deprived of any right, title, and interest therein.

Seventeenth. That the indebtedness to the First Wisconsin National Bank in the amount of $24,000.00, wherein Jean Wright was maker and William Wright was co-signer, said liability shall be assumed and paid by the plaintiff and the defendant-wife shall be saved harmless from any and all liability of any kind or nature with respect thereto.

Eighteenth. That the indebtedness to the First Wisconsin National Bank in the amount of $20,000.00 wherein William Wright was the maker,

shall be the sole liability of the plaintiff and the defendant shall be saved harmless from any and all liability with respect thereto.

Nineteenth. That the indebtedness of William Wright as officer to the Fall River Foundry, shall be the sole liability of said William Wright, and the defendant shall be saved harmless from any and all liability of any kind or nature with respect thereto.

Twentieth. That the plaintiff shall be liable for all health, medical and reasonably related expenses that the defendant may incur except for the first $250.00 per year and for said $250.00 of said expense the defendant shall be liable; said liability shall terminate upon defendant's remarriage.

Twenty-first. That the alimony be and hereby is denied.

Twenty-second. That the plaintiff, William C. Wright, shall maintain the present $200,000.00 of life insurance of which the defendant

is owner in full force and effect and shall maintain the defendant as beneficiary thereon for as long as said policy shall provide and at least to age 65 and shall keep the defendant as beneficiary of all the proceeds of said policy until she dies or remarries; that if there are any proceeds of this insurance that the defendant collects, whatever is not used by the defendant in her lifetime, shall be left at the time of her death to the children of the parties, either by her will or by trust or by separate trusts or by trusts in her will.

Twenty-third. That the plaintiff shall replace the 1964 Pontiac Bonneville Station Wagon presently owned by the defendant at the defendant's request in or by 1970, with a brand new model automobile and again in or by 1975; said automobiles shall be substantially equivalent and equipped as the current model of the automobile presently owned by the defendant.

Twenty-fourth. That with respect to financial counsel which is named "Fiduciary Counsel,

Inc." which manages the defendant's investment portfolio, all the expenses of said Fiduciary Counsel, Inc. exceeding $100.00 per year shall be paid by the plaintiff, but said plaintiff shall be relieved of any and all liability in connection with the advice that the defendant may or shall receive from said Fiduciary Counsel, Inc.; that the plaintiff's liability for payment to Fiduciary Counsel, Inc. shall terminate upon the defendant's death or remarriage.

Twenty-fifty. (a) That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff shall pay to the defendant the sum of $228,000.00 within ten and one-half (10-1/2) years of October 4, 1967, and payable on the following terms: No less than $2,000.00 per month be paid by the plaintiff to the defendant for the six months; XXXXXXXXXXXXX XXXXX that thereafter the plaintiff shall pay to the defendant no less than the sum of $1,800.00 per month for the balance of the term of the payment of the $228,000.00 specified herein.

(b) Further, that the payment of the sum of $228,000.00 shall be secured by sufficient marketable securities in the investment portfolio awarded to the plaintiff, William C. Wright, which stock shall be placed in escrow with the First Wisconsin Trust Company under suitable terms and conditions to secure the payment of the money awarded to the defendant herein, including, but not limited to the following terms: that the stocks which are placed in such escrow may be replaced by other stocks of equal or greater value or such stocks may be removed as may not be necessary to guarantee the payment of the balance due upon the payment of $228,000.00 and only such amount of stock need be maintained in escrow as may be reasonably necessary to guarantee the payment of the balance due and owing at the given time.

(c) Further, that in case of the death of the plaintiff, William C. Wright, prior to the payment in full of the $228,000.00, the amount owing upon the balance due the defendant shall

be paid to the defendant promptly; however, the choice of whether such amount shall be paid from the estate of the defendant, William C. Wright, or from this escrow account shall be at the choice of the duly appointed representative of the plaintiff, However, if the estate is not liquid or is insolvent, or impaired in any manner, then the escrow account or the guarantee of the escrow account is not waived by this provision and the provision is meant to give the choice of only where the amount is to be paid from if there is a choice.

Twenty-sixth. That the 600 shares of stock in the Fall River Foundry in the defendant's stock portfolio shall be sold to the plaintiff at the artibitrarily fixed price of the book value of said stock at the present time.

Twenty-seventh. That the plaintiff shall make a contribution toward the defendant's attorney's fees in the amount of $7,500.00 payable forthwith.

Twenty-eighth. ~~-That-the-plaintiff-has expressed-a-desire-to-maintain-the-house-at-Fox-Point~~ LJF

~~in-substantially-the-same-circumstances-and-that~~ LJF
~~under-such-circumstances,-the-children-of-the~~
~~parties,-age-15-and-17,-have-indicated-a-desire~~ LJF
~~to-remain-in-said-household-and-therefore,-although~~
Both parties are found to be fit and proper persons to have the care, custody, and control of the children of the parties, the ~~present~~-care, custody, and control LJF of said children is awarded to the plaintiff and the defendant shall have the right of visitation. Visitation by the defendant-mother is at reasonable times. Such reasonable times would include the children ~~daughter~~ actually physically staying overnight LJF with the mother at least one weekend a month and that defendant shall have a regular dinner engagement with her children at least one evening a week and on alternate weekends spending some time with them, allowing the father to have a full weekend without the interruption of visitation each month with his children, where he could take them on special things and so forth. The Department of Domestic Conciliation and the guardian ad litem are to

continue in this case as active participants in the rights of these children and the duty of these parents towards these children. They shall be available for consultation and for the arbitration of disputes that may come up in this matter.

Twenty-ninth. That the plaintiff shall return to the defendant all books, records, and related items with respect to the defendant's personal estate.

Thirtieth. That each of the parties shall execute any ancillary documents that are necessary to complete all the terms hereof.

Thirty-first. That the guardian ad litem's fee of Richard R. Teschner be and the same hereby is now fixed at $1,150.00. Each of the parties hereto shall be liable for one-half of said fee.

All payments provided for herein shall be made at the office of the Clerk of this Court at the Courthouse, in the City and County of MIlwaukee, aforesaid. Disobedience of the Court order with respect to cohabitation is punishable as contempt of

Court, and as to payment of allowances for the wife or children, is punishable under Sec. 295.03 of the Wisconsin Statutes by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to Law. Let judgment be entered accordingly.

Dated at Milwaukee, Wisconsin, this 29th day of January, 1968.

BY THE COURT,

/s/ L. J. Foley, Jr.
Circuit Judge

Findings approved this ____ day of November, 1967.
SHELLOW, SHELLOW & COFFEY

By_____
Gilda B. Shellow
Attorneys for Plaintiff

Findings approved this 8 day of December, 1967.

/s/ Richard R. Teschner
Richard R. Teschner
Guardian ad litem for
Minor children

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

WILLIAM C. WRIGHT,

Plaintiff,

v.

JEAN WRIGHT,

Defendant.

JUDGMENT OF DIVORCE

Case No. 348-178

This action having been brought on for trial on the 4th day of October, 1967, at the regular October Term, 1967, of this Court before the Honorable L. J. FOLEY, JR., Judge of said Court, and the Court having filed its findings of fact and conclusions of law from which it satisfactorily appears and wherein the Court finds that the defendant is entitled to a judgment of divorce, Now, on the motion of Ray T. McCann, defendant's attorney;

IT IS ADJUDGED:

First. That the bonds of matrimony heretofore subsisting between the plaintiff, William C. Wright,

and the defendant, Jean Wright, be and the same are hereby dissolved and they are forever freed from the obligations thereof, provided, that the judgment so far as it affects the marital status of the parties shall not be effective until the expiration of one year from the date of the granting of said judgment, except that it shall immediately bar them from cohabitating together and it may be reviewed on appeal during such period. But in case either party dies within said period, such judgment, unless vacated or reversed, shall be deemed to have entirely severed the marriage relation immediately before such death.

Second. That neither of the parties to this action shall marry again until one year after the granting of said judgment on the 4th day of October, 1967, and the marriage of either of the parties to this action solemnized before the expiration of one year from the date of the granting of this judgment shall be null and void.

Third. That the last known address of the

plaintiff is 7863 North Club Circle, in the Village of Fox Point, Milwaukee County, Wisconsin; and that of the defendant is Route 2, Box 414, Cedarburg, Wisconsin, 53012.

Fourth. Where either plaintiff or defendant is obligated herein or by otherjudgment or court order to support any minor issue (child or children) of the marriage not in his custody, he or she is prohibited by s. 245.10 from marrying again in this state or elsewhere after such judgment becomes effective (final) unless permission to marry is granted by order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue (child or children) resides, or where the marriage license application is made.

Fifth. That the plaintiff pay to the Clerk of Circuit Court an annual sum of $10, commencing January 1, next, pursuant to s. 59.42(10)(b), Wis.Stats. Clerk of Circuit Court is ordered

to deduct the first $10 received after January 1, next, apply accordingly as a receiving and disbursement fee.

Sixth. That the complaint of the plaintiff be and the same hereby is dismissed upon its merits.

Seventh. That based upon the representations of the plaintiff, William C. Wright, as to the nature and extent and value of the assets and liabilities of the estate of William C. Wright, and Jean Wright, a copy of which representation is attached hereto, it is adjudged as follows:

Eighth. That the farm and improvements in Washington County, the legal description of which property is attached hereto and made a part hereof as if fully set forth at length herein and marked Exhibit A, owned by the defendant, Jean Wright, be and the same hereby are awarded to her and the plaintiff is divested of any right, title, or interest therein.

Ninth. That the farm implements, furnishings, equipment, and all personalty located thereon,

except as otherwise provided herein, be and the same hereby is awarded to the defendant and the plaintiff is hereby divested of any right, title, and interest therein.

Tenth. That with respect to the mortgages upon said farm located in Washington County, the plaintiff shall hereby satisfy or assume the same and save the defendant harmless from any and all liabilities for the existing mortgages due on said real estate to Mr. Gerhardt Hillman, Mr. Philip Jennings, and Mr. Edward Leuders, Sr. which mortgages, liens, or encumbrances total approximately $17,266.00.

Eleventh. That said realty, improvements, and personalty located at said Washington County farm not otherwise specifically disposed of herein shall be the property of the defendant free and clear of any and all encumbrances of any kind or nature and the plaintiff shall execute a Quit Claim Deed to the defendant for said realty.

Twelfth. That the real estate known as 7863

North Club Circle, Fox Point, Wisconsin, the legal description of which property is attached hereto and made a part hereof as if fully set forth at length herein and marked Exhibit B, be and the same is hereby awarded to the plaintiff-husband, William C. Wright, and the defendant is hereby divested of any right, title, and interest in the same and shall execute a Quit Claim Deed to the plaintiff for said real estate and the defendant shall be saved harmless from any and all liability of any kind or nature with respect to said real estate.

Thirteenth. (a) With respect to the contents and furnishings and furniture located at the real estate known as 7863 North Club Circle, Fox Point, Wisconsin, the plaintiff is hereby awarded the same except insofar as the personal property which belongs to or was inherited by the defendant is located thereat and the additional list of personal property which the defendant shall furnish to the plaintiff within a reasonable time from the date hereof, and the plaintiff will see to it

that all said property referred to herein which is to be delivered adequately insured and paid for by the plaintiff to the defendant in good condition where she shall direct through her counsel within a reasonable time from the demand therefor.

(b) That all personal effects, clothing, jewelry, and items of inheritance, dowry, and gifts that defendant may have selected be and the same hereby are awarded to her and delivered as set forth in the previous paragraph.

(c) That all the personal property and effects in the possession of each of the parties not otherwise provided for herein, are hereby awarded to each of them and the other is hereby divested of all right, title, and interest in the same.

Fourteenth. (a) That the investment portfolio of the plaintiff, William C. Wright, with a value as of May 1, 1967, in the amount of $616,470.00 be and the same hereby is awarded to

the plaintiff, William C. Wright, and the defendant is divested of all right, title, and interest in the same except as otherwise herein provided.

(b) That the investment portfolio of Jean W. Wright, be and the same hereby is awarded to the defendant, Jean W. Wright, and the plaintiff is hereby divested of all right, title, and interest in the same.

Fifteenth. (a) That the 1964 Pontiac Station Wagon in the possession of the defendant be and the same is hereby awarded to the defendant and the plaintiff is hereby divested of all right, title, and interest in the same; that the balance of current or recently manufactured automobiles be and the same hereby are awarded to the plaintiff and the defendant is hereby divested of all right, title, and interest in the same and the defendant shall be saved harmless from any and all liability of any kind or nature with respect thereto.

(b) That the antique automobiles other than the 1919 Electric automobile be and the same hereby

are awarded to the plaintiff and the defendant is hereby divested of all right, title, and interest in the same; that the 1919 Electric automobile is awarded to the defendant and the plaintiff is hereby divested of all right, title, and interest in the same.

Sixteenth. (a) That with respect to the livestock and animals at the farm in Washington County which includes such things as Zebras, Wallabies, Addak, Llamas, Pigmy Donkeys, Peacocks, and cattle of that nature, are hereby awarded to the plaintiff-husband, and the defendant-wife is hereby divested of all right, title, and interest in the same; that the defendant is hereby awarded her horse named "Gus", goats, cats, and dog named "Dutch".

(b) Further that the plaintiff will have a reasonable time to remove the list of cattle as set forth herein from the farm which is anticipated to be sometime in the Spring of 1968; and the plaintiff-husband may remove the chain-link fencing

when the animals are removed in the Spring of 1968, providing it is done at said time at his sole expense and that he leaves all the rail fences in good and usable condition.

(c) That certain personal items such as books presently located in the house at the Washington County farm shall be awarded to the plaintiff and be delivered by the defendant to the plaintiff upon the furnishing of a list of said personal items as agreed upon.

(d) That the plaintiff-husband shall be liable for all farm expenses until all the animals and cattle awarded to him shall have been removed; said expenses shall include but shall not be limited to heat, light, maintenance expenses, help that is necessary for the plaintiff-husband's farm activities. These expenses shall include all expenses, except those relating to the residence located at said farm. With respect to the residence, the defendant-wife shall be liable for all the expenses in connection with the use and occupancy

of said residence including but not limited to light, heat, and gas.

(e) That in addition to the foregoing, the plaintiff shall pay to the defendant the sum of $250.00 per month commencing November 1, 1967, for the rental of the portion of the farm premises used by him until all the animals are removed from said premises; that the defendant shall be liable for the real estate taxes for the year 1967.

Seventeenth. That a note receivable in the amount of $1,000.00 be and the same hereby is awarded to the plaintiff and the defendant is deprived of any right, title, and interest therein.

Eighteenth. That the indebtedness to the First Wisconsin National Bank in the amount of $24,000.00, wherein Jean Wright was maker and William Wright was co-signer, said liability shall be assumed and paid by the plaintiff and the defendant-wife shall be saved harmless from any and all liability of any kind or nature with respect thereto.

Nineteenth. That the indebtedness to the First Wisconsin National Bank in the amount of $20,000.00 wherein William Wright was the maker, shall be the sole liability of the plaintiff and the defendant shall be saved harmless from any and all liability with respect thereto.

Twentieth. That the indebtedness of William Wright as officer to the Fall River Foundry, shall be the sole liability of said William Wright, and the defendant shall be saved harmless from any and all liability of any kind or nature with respect thereto.

Twenty-first. That the plaintiff shall be liable for all health, medical, and reasonably related expenses that the defendant may incur except for the first $250.00 per year and for said first $250.00 of said expense the defendant shall be liable; said liability shall terminate upon defendant's remarriage.

Twenty-second. That alimony be and hereby is

denied.

Twenty-third. That the plaintiff, William C. Wright, shall maintain the present $200,000.00 of life insurance, being with the Northwestern Mutual Life Insurance Company, Policy No. 5 531 595, date of issuance, August 22, 1963, of which the defendant is owner in full force and effect and shall maintain the defendant as beneficiary thereon for as long as said policy shall provide and at least to age 65 and shall keep the defendant as beneficiary of all the proceeds of said policy until she dies or remarries; that if there are any proceeds of this insurance that the defendant collects, whatever is not used by the defendant in her lifetime shall be left at the time of her death to the children of the parties, either by her will or by trust or by separate trusts in her will.

Twenty-fourth. That the plaintiff shall replace the 1964 Pontiac Bonneville Station Wagon presently owned by the defendant at the defendnat's request in or by 1970, with a brand new model automobile and

again in or by 1975; said automobiles shall be substantially equivalent and equipped as the current model of the automobile presently owned by the defendant.

Twenty-fifth. That with respect to financial counsel which is named "Fiduciary Counsel, Inc." which manages the defendant's investment portfolio, all the expenses of said Fiduciary Counsel, Inc. exceeding $100.00 per year shall hereby be paid by the plaintiff, but said plaintiff shall be relieved of any and all liability in connection with the advice that the defendant may or shall receive from said Fiduciary Counsel, Inc.; that the plaintiff's liability for payment to Fiduciary Counsel, Inc. shall terminate upon the defendant's death or remarriage.

Twenty-sixth. (a) That as and for a complete division of estate and to complete the division of property of the parties, the plaintiff be and he hereby shall pay to the defendant the sum of $228,000.00 within ten and one-half (10-1/2) years

of October 4, 1967; and payable on the following terms: No less than $2,000.00 per month be paid by the plaintiff to the defendant for the first six months; that thereafter the plaintiff shall pay to the defendant no less than the sum of $1,800.00 per month for the balance of the term of the payment of the $228,000.00 specified herein.

(b) Further, that the payment of the sum of $228,000.00 shall be secured by sufficient marketable securities in the investment portfolio awarded to the plaintiff, William C. Wright, which stock shall be placed in escrow with the First Wisconsin Trust Company under suitable terms and conditions to secure the payment of the money awarded to the defendant herein, including, but not limited to the following terms: that the stocks which are placed in such escrow may be replaced by other stocks of equal or greater value or such stocks may be removed as may not be necessary to guarantee the payment of the balance due and owing at the given time.

(c) Further, that in case of the death of the plaintiff, William C. Wright, prior to the payment in full of the $228,000.00 the amount owing upon the balance due the defendant shall be paid to the defendant promptly; however, the choice of whether such amount shall be paid from the estate of the defendant, William C. Wright, or from this escrow account shall be at the choice of the duly appointed representative of the plaintiff. However, if the estate is not liquid or is insolvent, or impaired in any manner, then the escrow account or the guarantee of the escrow account is not waived by this provision and the provision is meant to give the choice of only where the amount is to be paid from if there is a choice.

Twenty-seventh. That the 600 shares of stock in the Fall River Foundry in the defendant's stock portfolio shall hereby be sold to the plaintiff at the arbitrarily fixed price of the book value of said stock at the present time.

Twenty-eighth. That the plaintiff shall make

a contribution toward the defendant's attorney's fees in the amount of $7,500.00 payable forthwith.

Twenty-ninth. That both parties are found to be fit and proper persons to have the care, custody, and control of the children of the parties; the care, custody, and control of said children is hereby awarded to the plaintiff and the defendant shall have the right of visitation. Visitation by the defendant-mother is at reasonable times. Such reasonable times would include the children actually physically staying overnight with the mother at least one weekend a month and that defendant should have a regular dinner engagement with her children at least one evening a week and on alternate weekends spending some time with them, allowing the father to have a full weekend without the interruption of visitation each month with his children, when he could take them on special things and so forth. The Department of Domestic Conciliation and the guardian ad litem are to continue in this case as active participants in

the rights of these children and the duty of these parents towards these children. They shall be available for consultation and for the arbitration of disputes that may come up in this matter.

Thirtieth. That the plaintiff shall hereby return to the defendant all books, records, and related items with respect to the defendant's personal estate.

Thirty-first. That each of the parties shall execute any ancillary documents that are necessary to complete all the terms hereof.

Thirty-second. That the guardian ad litem's fee of Richard R. Teschner be and the same hereby is now fixed at $1,150.00. Each of the parties hereto shall be liable for one-half of said fee.

Thirty-third. That all payments provided for herein shall be made at the office of the Clerk of this Court at the Courthouse, in the City and County of Milwaukee, aforesaid. Disobedience of the court order with respect to cohabitation is punishable as contempt of court, and as to

payment of allowances for the wife or children, is punishable under Sec. 295.03 of the Wisconsin Statutes by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to Law.

Dated at Milwaukee, Wisconsin, this 2nd day of February, 1968.

FRANCIS X. McCORMACK, Clerk

BY: A.G. Duvernell /s/
Deputy Clerk

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
FAMILY COURT BRANCH

WILLIAM C. WRIGHT,

Plaintiff,

vs.

NOTICE OF MOTION AND MOTION

JEAN WRIGHT,

Case No. 348-178

Defendant.

PLEASE TAKE NOTICE that the defendant, by her attorneys, Fox, Carpenter & O'Neill, by Bruce C. O'Neill, will move that branch of the Circuit Court for Milwaukee County presided over by the Hon. Robert Curley, in his courtroom in the Milwaukee County Courthouse, on the 21st day of July, 1977 at 2:00 P.M. or as soon thereafter as counsel may be heard, for the entry of an Order as follows:

1. Reviewing the Findings or Order of the Milwaukee County Family Court Commissioner of July 1, 1977 with regard to the attached Order to Show Cause and Petition and granting the relief sought by such Order to Show Cause, to-wit:

modifying the Judgment herein to provide for additional alimony payable by the plaintiff to the defendant in an amount sufficient to enable her to meet her added income tax obligations;

2. In the alternative, enforcing the Judgment by requiring the plaintiff to pay sufficient moneys to the defendant to enforce paragraph 26 of the Judgment, to-wit: the receipt of $228,000 without any diminution by income taxes;

3. In the alternative, for the vacation of the property division portion of the Judgment upon the basis of the plaintiff's suppression of true values and concealment of assets at the time of the final hearing.

Dated at Milwaukee, Wisconsin this 8th day of July, 1977.

FOX, CARPENTER & O'NEILL

By:_____
Bruce C. O'Neill
622 North Water Street
Milwaukee, Wisc. 53202
(414) 273-3939
Attorneys for Defendant

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
FAMILY COURT BRANCH

WILLIAM C. WRIGHT,

Plaintiff,

vs.

JEAN WRIGHT,

Defendant.

ORDER TO SHOW CAUSE FOR MODIFICATION OF JUDGMENT AS TO ALIMONY

Case No. 348-178

Upon the defendant's verified petition attached hereto, and on motion of defendant's attorneys, Fox, Carpenter & O'Neill by Bruce C. O'Neill,

IT IS HEREBY ORDERED, that the above named plaintiff show cause, in person, before the Hon. Sol T. Goddsitt, Family Court Commissioner in and for Milwaukee County, Room 707, in the Courthouse at 901 North Nineth Street, Milwaukee, Wisconsin on the 28th day of February, 1977 at 2:00 o'clock P.M. or as soon thereafter as counsel may be heard, why an order should not issue modifying the judgment herein to provide for additional alimony payable by the plaintiff to the defendant in an amount sufficient to enable her to meet her added income

tax obligations as set forth in her attached petition;

IT IS FURTHER ORDERED, that both parties shall produce at said hearing wage statements from their respective employers for a period of eight weeks prior to said hearing;

IT IS FURTHER ORDERED, that both parties show cause why a receiving and disbursing fee should not be ordered paid according to sec. 59.42 (10)(b), Wis. Stats.;

IT IS FURTHER ORDERED, that both parties shall produce at said hearing financial declarations, under oath, and copies of State and Federal income tax returns for the past two years;

IT IS FURTHER ORDERED, that a copy of this order together with attached petition be served on the plaintiff in person at least 48 hours before the time fixed herein for said hearing.

Dated at Milwaukee, Wisconsin this 10th day of February, 1977. Glen W. Ploetz /s/

Asst. Family Court Commissioner

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

WILLIAM C. WRIGHT,

Plaintiff,

V.

JEAN WRIGHT,

Defendant.

PETITION FOR MODIFICATION OF JUDGMENT

Case No. 348-178

Jean Wright, being first duly sworn on oath, deposes and states that:

1. I am the defendant in the above-entitled action and am an adult resident of Wisconsin. I have never remarried since this divorce. On October 4, 1967, the plaintiff and his attorney, Gilda Shellow, and I and my attorney, Leonard Loeb, appeared before the Milwaukee County Circuit, Family Division, the Hon. Leander J. Foley, Jr. presiding, for a default hearing upon your affiant's counterclaim for divorce against the plaintiff. A transcript of such proceedings is attached hereto as Exhibit A.

2. During the said hearing it was stipulated, among other things, that the plaintiff was to pay

me the sum of $288,000 over ten and one-half years from that date. It was my belief and the belief of my attorney that the said payments were part of the division of property and were not to be includable in my income nor deductible from my husband's income for income tax purposes.

3. After the said hearing I was informed that the plaintiff considered the said payments to be includable in my income and deductible from his income for income tax purposes.

4. On December 8, 1967, the plaintiff and his attorney and I and my attorney appeared before the Hon. Leander J. Foley, Jr.; and the attorneys argued to the Court about the income tax consequences of said payments. My attorney submitted proposed Findings of Fact and Conclusions of Law, including paragraph 26 as to the said payments. The plaintiff's attorney submitted a proposed paragraph 26 as to the said payments. The Court took the matter under advisement and then signed the Findings of Fact and Conclusions of Law proposed by my attorney including

my attorney's proposed paragraph 26. A transcript of the hearing is attached hereto as Exhibit B. A copy of the plaintiff's attorney's proposed paragraph 26 is attached hereto as Exhibit C. A copy of the Court's Findings of Fact and Conclusions of Law as drafted by my attorney are attached hereto as Exhibit D.

5. The judgment of divorce was entered on February 2, 1968, a copy of which is attached hereto as Exhibit E.

6. For the year 1967 the plaintiff and I filed joint Federal and Wisconsin income tax returns.

7. For 1968 and every year thereafter, the plaintiff and I filed separate Federal and Wisconsin income tax returns. I did not include any of the said payments in my income.

8. In 1970 I was informed by the Internal Revenue Service that the plaintiff had deducted his said payments for 1968 and 1969 on his Federal income tax returns.

9. Since 1970 I have been in litigation with the plaintiff before the Internal Revenue Service, the United States Tax Court and before the United States Court of Appeals for the Seventh Circuit, as to whether or not the said payments were property division or alimony.

10. While we were before the United States Tax Court, the Internal Revenue Service agreed with me that the said payments were property division rather than alimony, thus not includable in my income and not deductible by the plaintiff.

11. Before the United States Tax Court, the plaintiff's attorney made the following statements, among others, in his brief:

> "Furthermore, William considered the payments as being in the nature of alimony at the time of the settlement. Likewise, William's attorney was clearly of the opinion that the payments would be deductible by William. The support objective is further reinforced by William's agreement to pay certain investment counseling fees and medical expenses of Jean and to provide her with an auto for a period of time." (pp. 2-3)

and

> "The meaning of the language used by the Trial Court at the hearing of December 8, 1967 as it concerns that $228,000 principal sum is far from clear. At best, the Judge's views on the tax consequences of the payments are ambiguous and in no way binding on the nature of the payments."

12. In 1974 the United States Tax Court upheld the position of the plaintiff. A copy of its decision is attached hereto as Exhibit F. In that decision the Court made the following statements, among others:

> (The issue to be decided is) "whether the cash payments made by William C. Wright during the calendar years 1968, 1969 and 1970 to his former wife, Jean W. Wright, are includable in her gross income for such years as alimony under the provisions of section 71, I.R.C. 1954, and consequently deductible for such years by William C. and Ellen W. Wright under the provisions of section 215." (p. 3.)

and

> "Therefore, (William) concludes the payments are includable as alimony in his former wife's income and deductible by him." (p. 25.)

13. I appealed the decision of the United States Tax Court to the United States Court of Appeals for the Seventh Circuit.

14. Before the Seventh Circuit the plaintiff's attorney made the following statements, among others in his brief:

> "The question whether the payments in dispute represent consideration for the transfer of the wife's rights in property or are in satisfaction of the husband's obligation of support is a question which has been before the courts on numerous occasions. *** We submit that the record in this case fully supports the Tax Court's conclusion that the payments in issue were in the nature of support payments." (p. 6)

and

> "At best, the trial court's views of the income tax consequences of the payments are equivocal; and in any event the trial court's views are not binding on the treatment of the payments for Federal income tax purposes. It was certainly not William's intention that the payments to Jean be for settlement of property rights and not for support." (pp. 15-16.)

and

> "The determination of the Tax Court that the payments in question in this case were for the support of the wife is supported by the overwhelming weight of the evidence. In her pleadings in the divorce action, Jean asked for alimony or support and that is exactly what she received." (pp. 18-19.)

15. In 1976 the Seventh Circuit upheld the position of the plaintiff. A copy of its decision

is attached hereto as Exhibit G. In its decision it made the following statements, among others:

> "The issues on appeal are those which were before the Tax Court:
>
> (1) Whether the cash payments paid by William C. Wright during calendar years 1968, 1969, 1970 to his former wife, Jean W. Wright, are includable in her gross income for such years as alimony under the provisions of section 71, I.R.C. 1954, and consequently deductible for such years by William C. and Ellen W. Wright, under the provisions of section 215."

and

> "The Court further held that William's obligation to so compensate Jean was due to 'their marital and family relationship', i.e., pursuant to William's obligation of support rather than in satisfaction of Jean's property rights." (pp.7-8.)

16. The Milwaukee County Circuit Court has jurisdiction to modify its judgment on at least two alternative bases. First, both plaintiff and defendant agreed that the judgment provides for alimony in at least two alternative bases. First, both plaintiff and defendant agreed that the judgment provides for alimony in at least paragraphs 21, 24 and 25 as follows:

"Twenty-first. That the plaintiff shall be liable for all health, medical and reasonably related expenses that the defendant may incur except for the first $250 per year and for said first $250 of said expense the defendant shall be liable; said liability shall terminate upon defendant's remarriage."

and

"Twenty-fourth. That the plaintiff shall replace the 1964 Pontiac Bonneville station wagon presently owned by the defendant at the defendant's request in or by 1970, with a brand new model automobile and again in or by 1975; said automobile shall be substantially equivalent and equipped as the current model of the automobile presently owned by the defendant."

and

"Twenty-fifth. That with respect to financial counsel which is named 'Fiduciary Counsel, Inc.' which manages the defendant's investment portfolio, all the expenses of said Fiduciary Counsel, Inc. exceeding $100 per year shall hereby be paid by the plaintiff, said plaintiff shall be relieved of any and all liability in connection with the advice that the defendant may or shall receive from Fiduciary Counsel, Inc.; that the plaintiff's liability for payment of Fiduciary Counsel, Inc. shall terminate upon defendant's death or remarriage."

Second, paragraph 26, which now has been construed to be for support rather than property settlement, is thus alimony and modifiable by this Court.

17. There are changed circumstances now existing in that a larger income tax obligation for both the United States and Wisconsin for the years 1969 through 1975 and will have a larger obligation in future years. An accountant is presently preparing the details of such obligations for me. My attorney informs me that unanticipated income taxes for a wife constitute a changed circumstance which provides a basis for increasing alimony. Volume 2A, Nelson on Divorce, sec. 17.10.

18. I do not have any more income than I had at the time of the divorce to meet my added income tax obligations, and meeting such obligations will work a hardship on me.

Dated at Milwaukee, Wisconsin, this 3rd day of February, 1977.

Jean W. Wright /s/
JEAN WRIGHT

Subscribed and sworn to before me
this 3rd day of February, 1977.

.....
Notary Public, State of Wisconsin
My Commission: 10/2/78

ABRIDGEMENT OF WILLIAM C. WRIGHT'S

BRIEF IN OPPOSITION TO MOTION

FOR MODIFICATION OF JUDGMENT

(Caption Omitted)

II. CHARACTERIZING PAYMENTS AS ALIMONY UNDER FEDERAL INCOME TAX LAW DOES NOT DETERMINE THE NATURE OF THE PAYMENTS UNDER WISCONSIN LAW.

The thrust of Jean Wright's ("Jean") argument is that "alimony" for Federal income tax purposes does not differ from "alimony" for Wisconsin divorce law purposes. She also claims that to permit William Wright ("William") to enjoy the tax benefits of the payments to her would frustrate the alleged intention of the trial court in the divorce proceedings not to have the payments taxable to her and she points to the provision in the divorce judgment expressly denying alimony.

As Jean indicates, the forerunner of Section 71 was added to the Internal Revenue Code by the Revenue Act of 1942 in order to provide uniformity for the tax treatment of payments made to a former spouse arising out of a divorce. Another reason for its

enactment was to impose the tax burden on the one who enjoyed the benefits of the payments. S.Rep. No. 1631, 77th Cong. 2d Sess. 83 (1942). In addition, as Jean notes, nowhere in the text of the Internal Revenue Code does the term "alimony" appear. Instead, the Code speaks in terms of payments discharging a legal obligation arising out of the marital relationship. This has been interpreted to refer to payments made by a former spouse to discharge a general obligation of support. In Federal tax parlance the term "alimony" has been applied to describe such payments. Wilma Thompson, 50 T.C. 522,525 (1968).

Characterizing payments as alimony or for support under Federal income tax law does not have the effect of determining the nature of such payments under state law, no more than state law controls the character of such payments for Federal income tax purposes. In Brown v. United States, 121 F. Supp. 106 (D.C.N.D. Calif. 1954), the Government argued that to constitute "alimony" under the Internal

Revenue Code, it was necessary that the payments be alimony within the meaning of state law. Under California law the payments in question did not qualify as alimony. In rejecting this argument, the Court ruled that the meaning of "alimony" was not necessarily the same for Federal income tax as for state law purposes. It concluded that there was no evidence that the payments were for a property interest and, consequently, were the means by which the husband discharged his marital obligation of support.

For other tax cases differentiating alimony under Federal tax law and the laws of different states, see Bardwell v. Commissioner, 318 F.2d 786 (10th Cir. 1963), aff'g, 39 T.C. 84 (1962), where the payments were probably not alimony under Colorado law; Taylor v. Campbell, Jr., 335 F.2d 841 (5th Cir. 1964), where there was no legal obligation to make the payments under Texas law which considered them permanent alimony; Marion R. Heese, 60 T.C. 685 (1973), where Pennsylvania law did not permit

the payment of alimony in the case of an absolute divorce; also see Revenue Ruling 58-192, 1958-1 Cum. Bull. 34.

The rule to be gleaned from the foregoing is that payments may, under state law, represent a division of property and still be treated as alimony under Federal income tax law. This is precisely what the Tax Court and the Seventh Circuit held in the Wrights' tax case. Wright v. Commissioner, 543 F. 2d 593 (7th Cir. 1976), aff'g, 62 T.C. 377 (1974). The Tax Court said at page 392:

> . . . Section 274.26 of the Wisconsin Statutes confers upon a divorce court the authority to adjudge to the wife such alimony out of the estate of the husband for her support as it deems just and reasonable and to divide the estate of the husband between the parties having regard to the legal and equitable rights of each party. This statute contemplates that both alimony payments and division of the estate of the husband are means of discharging the obligation of the husband upon termination of the marital relationship to continue to support his wife in the manner to which she has become accustomed. Wisconsin Department of Taxation v. Siegman, 24 Wis. 2d 92, 128 N.W. 2d 658 (1964); Tonjes v. Tonjes, 24 Wis. 2d 120, 128 N.W. 2d 446 (1964). See Lacey v. Lacey, supra; Radandt v. Radandt, supra

Both the Seventh Circuit and the Tax Court concluded that the reason the payments took the form of a division of estate was to foreclose Jean from securing the very relief she is seeking in this proceeding and William from attempting to gain a reduction in the amount of the payments to Jean. The Tax Court's view was set out on page 392 as follows:

> This record suggests that Jean preferred and William was agreeable to a division of property rather than payment of alimony since under Wisconsin law the State court would be foreclosed from thereafter modifying its judgment. Gray v. Gray, 240 Wis. 295, NW 2d 376 (1942)

The Seventh Circuit stated on page 599 the following:

> . . . As the Tax Court noted, a payment of a fixed and secured sum over a definite period of time may nevertheless be intended to discharge the general obligation of support. It is not uncommon for the parties to provide for such payments, in lieu of alimony, where they wish to insure that the decree of divorce will not be subject to late modifications by the Court.

For similar statements, see Wilma Thompson, supra 527 Ann Hairston Ryker, 33 T.C. 924, 930 (1960).

It is clear that just because payments

are deemed to be for purposes of support under the Federal tax law does not necessarily mean that they constitute alimony under Wisconsin divorce law. As Jean points out, alimony was expressly denied by the trial court. The decision in the tax case does not result in the creation of that which was denied by the court in the divorce proceeding.

Additional support for William's position is provided by Seiler v. Seiler, 48 Wis. 2d 400, 180 NW 2d 627 (1970). There the wife alleged that the property division decreed by the trial court was an abuse of discretion because it failed to consider the unfair tax consequences to her of the division. The trial court's oral pronouncement on October 11, 1968 was for the husband to pay the wife $25,000 within 90 days plus $25,000 to be paid in annual installments of $2,500, commencing November 1, 1969. In its written judgment the court provided for the final payment to be made on the January 1st following the November of the tenth year and that the payments shall be treated as

"periodic payments" under Section 71 of the Internal Revenue Code. The Supreme Court observed that the $2,500 installment payments will be "periodic payments" and be taxable to the wife and deductible to the husband and that this would have been true even if the trial court had not referred to the payments as "periodic" and provided that the last payment was to be made on January 1, 1979 instead of November 1, 1978.* Nowhere does the Supreme Court suggest that because the payments are taxable to the wife, they constitute alimony and not part of a property division under Wisconsin law.

---

*The parties in this case (Wright) also orally stipulated that the wife was to receive $228,000 payable over ten and one-half years from the date of hearing. The awarding of a lump sum, whether paid at one time or in installments, to a spouse in a divorce proceeding is generally held to constitute a property settlement rather than alimony under Wisconsin law. Fritschler v. Fritschler, 208 NW 2d 336, 60 Wis. 3d 283 (1973). And, as has been previously stated, the law expressly provides that such awards are not thereafter to be distributed.

Jean's contention that the trial court intended the payments to her to be non-taxable is not supported by the record. At best, the trial court's statements on which she relied are equivocal. From what happened in this case, it is obvious that regardless of the language appearing in the divorce judgment the payments were taxable to Jean. Under such circumstances it would be more proper to assume that the trial court knew what the law was than that it did not.

If the trial court truly intended the payments not to be taxable to Jean, it could have, as the Seventh Circuit suggested at page 598, easily provided for the principal sum to be paid within ten years and not 10-1/2 years. Another method of achieving the same result had it indeed been intended, would have been for the trial court to decree that William pay all income taxes which Jean might owe on account of the payments to her, as was done in Taylor v. Campbell, Jr.. supra.

In any event, even if the trial court

and Jean were mistaken as to the tax consequences of the property division, such a mistake could not be rectified at this time. Where the tax consequences of a divorce judgment turn out to be other than what had been anticipated because of a mistaken interpretation of, or a change in, the tax law, no grounds exist for relief from the judgment if it ordered a property division. See Fitch v. Fitch, 229 Iowa 349, 294 NW 577 (1940).

Seizing on William's contention in the tax case that the payments were for support and in the nature of alimony as that term is used for tax purposes, Jean claims that William is now taking an inconsistent position. We believe that William's position is altogether consistent with the difference in the meaning of "alimony" in the tax law and under Wisconsin divorce law. Insofar as inconsistencies are concerned, we note that the Seventh Circuit summarized Jean's argument in the tax case as follows, at page 598:

> . . . She argues that the record is silent as to her need for support, that she had substantial property of her own and that the divorce court's decree reflects an intention that the payments be part of a property settlement, not contributions toward her support.

While Jean may be correct to the extent that she advocates that payments which constitute alimony under Wisconsin law likewise represent alimony within the meaning of the tax law, she errs when she claims the converse to be true. In addition she ignores the Wisconsin rules that a property settlement may discharge a husband's obligation to support his wife even after a divorce, in spite of its recognition by the Wisconsin Supreme Court, the Seventh Circuit and the Tax Court.

CONCLUSION

Wis. Stats. §247.32 directs that a judgment of divorce providing only for a division of property and not for alimony may not thereafter be revised or modified after the time which has elapsed in this case. The Court, therefore, lacks statutory

jurisdiction to reopen such a judgment. And, while the labels attached in the divorce judgment are not in themselves conclusive, where there has been an actual division of the parties' estate and where the defendant wife has been awarded a lump sum payment payable in installments, such an award should be considered a division of property.

Characterizing the payments as "alimony" under Federal income tax law does not make such payments "alimony" within the meaning of Wisconsin statutory or case law.

Accordingly, defendant's motion must be dismissed.

Dated at Milwaukee, Wisconsin this 10th day of September, 1977.

GODFREY & KAHN, S.C.
and
COOK & FRANKE, S.C.
Attorneys for Plaintiff

By /s/ Robert E. Cook
Robert E. Cook

ABRIDGEMENT OF
JEAN WRIGHT'S PETITION
TO APPEAL TO THE
WISCONSIN SUPREME COURT

(CAPTION OMITTED)

Jean Wright, petitioner, by her attorney, Bruce C. O'Neill, hereby petitions the Supreme Court of the State of Wisconsin pursuant to sec. 808.10 Stats. and Rule 809.62, to review the decision of the Court of Appeals District I, in William C. Wright v. Jean Wright, Case No. 77-686, filed on November 17, 1978 on the grounds:

FACTS

1. The record reveals that, after a stipulated default hearing in a divorce case before the Milwaukee County Circuit Court, the Honorable Leander J. Foley presiding, on October 4, 1967, the attorneys for the parties could not agree on the wording of the Conclusions of Law. They specifically

could not agree on the income tax consequences of $228,000.00 payable over ten and one-half years by the husband to the wife. The husband wanted them to be deductible by him and taxable to the wife, and the wife wanted them to be non-deductible by the husband and non-taxable to the wife.

2. The attorneys for the parties argued their positions to the trial court on December 8, 1967, and each submitted a differently worded Conclusion of Law. The issue was clearly defined, and the attorneys agreed to let the trial court decide it. The trial court observed that "the question is the wording of the findings of fact, conclusions of law and judgment. There are substantial financial problems involved in the wording" and took the matter under advisement. (R. 83-85, R-Ap 102-105).

3. On January 29, 1968, the trial court adopted the conclusions of law proposed by

the wife as to the $228,000.00 as follows:

"That alimony be and hereby is denied."

and

"That as and for a complete division of estate of the parties, the plaintiff shall pay to the defendant the sum of $228,000.00 within ten and one-half (10 1/2) years of October 4, 1967, payable on the following terms: No less than $2,000.00 per month to be paid by plaintiff to the defendant for six months; that thereafter the plaintiff shall pay to the defendant no less than the sum of $1,800.00 per month for the balance of the term of the payment of the $228,000.00 specified herein (R.12-13, R-Ap 106-107; R. 84, R-Ap. 103)"

The trial court rejected the husband's proposed conclusion of law that these payments were "in lieu of alimony" (R. 1-2 R-Ap. 106; R. 81, R-Ap. 101) which would have made them deductible under tax law as discussed in the Court of Appeals decision herein. The husband did not appeal.

5. The husband, nonetheless, deducted the payments and then convinced the United States Tax Court and the United States Court

of Appeals for the Seventh Circuit that the payments were not for division of estate but were deductible as support payments for his wife. William C. Wright, (1974), 62 T.C. 377; Wright v. Commissioner, (7th Cir. 1976), 543 F. 2d 593. This caused income taxes and interest for the wife of $102,840.00.

6. Before the Tax Court the husband argued, exactly the opposite of what he now argues, that he "considered the payments as being in the nature of alimony at the time of the settlement". (exh. 19, p.3) With regard to the trial court having stated that the payments were for division of estate and not for alimony, he argued that "the labels placed on the payments by the parties or by the divorce decree, or we might add, state law are not of significance in resolving the issue under consideration." (exh. 19, p. 1) Before the Seventh Circuit the husband argued that, "In her pleadings

in the divorce action, Jean asked for alimony or support and that is exactly what she received." (exh. 18, pp. 18-19) He also argued that, "Labels attached to payments by courts, parties, and statutes do not determine their character for federal tax purposes." (exh. 18, P.14) The courts agreed that they were not bound by any trial court statements, and the payments were for the support of the wife and not for division of estate.

7. The plaintiff then went back to the trial court, the Honorable Robert M. Curley presiding, which reaffirmed that it had intended these payments to be non-deductible by the husband and non-taxable to the wife as division of estate and not as alimony payments. It then acted under sec. 247.01 of the Wisconsin Statutes which provides that divorce courts have "authority to do all acts and things necessary and proper ...

to carry their orders and judgments into execution ...." It ordered the husband to pay the wife $102,840.00 so that she could pay her income taxes on the above payments which taxes resulted from husband deducting the payments and convincing the federal courts that the payments were for support of his wife and not for division of estate. The court also stated that the judgment did provide for alimony in other provisions as to medical and investment expenses, such that the trial court further had jurisdiction to award additional alimony under sec. 247.32 of the 1969 Wisconsin Statutes[1] to enable the wife to pay her income taxes if it had so chose.

[1]The Court of Appeals' decision erroneously refers to sec. 247.32 of the 1975 Wisconsin Statutes. The relevant statute is sec. 247.32, Stats. as it existed before its amendment in 1971. Such statute provided that alimony provisions of the judgment were always subject to modification. The 1971 amendment provided that alimony for a limited time cannot be revised, but such amendment has no effect on judgments rendered prior to 1971. Laws 1971, Ch. 220, sec. 22.

8. Before the trial court the husband argued, just the opposite of what he had argued before the federal court, that the payments were for division of estate and not alimony and that the trial court thus had no jurisdiction to enforce the judgment under sec. 247.01 or to modify the judgment under sec. 247.32. The trial court rejected this argument.

14. It is submitted that the Court of Appeals decision conflicts with Rotter, Wetzel and Burg. The Court of Appeals observation that division of estate payments are modifiable within one year under sec. 806.07, Stats., is of no help, since the income tax consequences of payments often do not come to light for a period longer than one year. That was case here where the parties filed a joint income tax return for the year 1967 and did not file their separate returns for the year 1968 until the spring of 1969.

15. Under the Court of Appeals decision herein, a trial court, which must take into account income tax consequences at the time of the final hearing, is barred from taking into account income tax consequences with regard to a motion to enforce that same judgment or to modify that same judgment to provide additional alimony to meet unintended and unanticipated tax consequences. Under the Court of Appeals decisions herein, a husband can argue to the taxing authorities that payments are for alimony and thus deductible and then can argue to the divorce court that the same payments are for division of estate and thus not modifiable. This is unjust and should be remedied by this Court.

Dated at Milwaukee, Wisconsin this 14th day of December, 1978.

Bruce C. O'Neill
622 North Water St.
Milwaukee, WI 53202
(414) 273-3939
Attorney for Petitioner,
Jean Wright

ABRIDGEMENT OF JEAN WRIGHT'S
BRIEF ON APPEAL TO THE
WISCONSIN SUPREME COURT

ARGUMENT

I.

A DIVORCE COURT CAN AND MUST CONSIDER THE ACTUAL INCOME TAX CONSEQUENCES OF PAYMENTS UNDER REVIEW INCIDENT TO A MOTION TO ENFORCE OR MODIFY A JUDGMENT OF DIVORCE.

It is submitted that it is a logical extension of Wetzel that a trial court can and must consider the actual income tax consequences of payments on a motion to enforce the judgment or on a motion to modify the judgment. In Wetzel, the court reversed the judgment of the trial court for not having taken into account income tax consequences of payments and stated as follows at p. 110:

> "We think in making a division of property or in granting alimony or both that consideration should be given to the tax consequences. Disregarding the effect of taxes may result

> in an unrealistic and unjust result. We do not hold the trial court must adopt as a solution a method which produces the least amount of tax for the husband or for the wife, but in arriving at a determination of the business side of the divorce the tax impact is a consideration which permeates the whole process.*** How the arrangement or division works out in reality after taxes is a test of fairness."

The above reasoning applies just as well after judgment as before judgment. It is submitted that application of the Wetzel rule is particularly appropriate in this case where the trial court has manifested its intent as to income tax consequences, where the husband defies the trial court by deducting payments anyway, and where the husband then argues to the federal courts that the payments really were intended to be for support and not for division of property. The fact is that the parties had no common intent as to the nature of those payments and asked the court to resolve their dispute as to the nature of those payments. The trial court did what the parties asked it to do, and the husband then reneged on his agreement to

have the trial court decide the issue. His reneging took the form of his deducting the payments and then arguing in the federal court that the parties really had agreed that the payments were for support.

This is a case where the wife feels keenly the injury that can result in one set of facts being tried in two different court systems. One form of injustice that can occur is that a party can take contradictory positions in the two systems and still prevail in both systems by each system refusing to recognize the action of the other. Here, the husband argued in the federal system that the payments were not for property division but were for support. When the case then returned to the state system, the husband argued and still argues that the payments were really for property division and not for support and thus are not modifiable regardless of how and why the federal system treated them as support payments. The respondent earnestly submits that this court strike down this Catch-22 argument and affirm the

lower court's decision which only required the husband to abide by his earlier agreement to allow the divorce court to determine the nature of the payments.

The position of the husband, as set forth in his response to the respondent's petition to appeal herein, was that the trial court made no decision on the income tax consequences of the payments herein but rather let the incidences of taxation fall as the tax law may provide. The position of the husband then is that the trial court violated its duty to consider income tax consequences and simply awarded $228,000 to the wife without giving any thought to whether she would receive that amount or an amount over $100,000 smaller. There is no basis in the record for this assumption of irregularity; rather the record is clear that the trial court deliberately intended that the payments be a tax-free division of property to the wife.

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CONCLUSION

The intermediate appellate court's narrow construction of a divorce court's enforcement powers under sec. 247.01 of the Wisconsin Statutes conflicts with this court's construction of that statute in Rotter v. Rotter, supra. The appellate court's further holding that a divorce court cannot consider the actual income tax consequences of payments on a motion to enforce or modify conflicts with this court's decision in Wetzel v. Wetzel, supra. The appellate court's establishment of a nature of the alimony test to determine a divorce court's jurisdiction to award alimony has no support in the case law and conflicts with this court's decision in Burg v. Burg, supra.

This court should reverse the decision of the Intermediate Court of Appeals, District I, and affirm the other and judgment of the Milwaukee County Circuit Court. As the trial court has stated twice, it intended that the wife receive

$228,000 tax-free as her relatively modest division of estate after twenty years of marriage. $125,160 is not the same as $228,000. The respondent asks only for the simple justice of receiving what the divorce court twice has decided that she is entitled to as her just share of the parties' property. The divorce court should not be denied the power to do what it believes equity requires it to do.

Respectfully submitted,

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